IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

79-505

UNIHEALTH SERVICES CORPORATION,
Petitioner,

versus

Harris,
~~JOSEPH P. CALIFANO~~, SECRETARY OF HEALTH, EDUCATION AND WELFARE, MELVIN BLUMENTHAL, MARION J. SEABROOKS, MIKE HOBAN, JOSEPH BREWSTER, RAYMOND WOERNER, I. COHEN, BLUE CROSS ASSOCIATION OF AMERICA, INC. AND JAMES SLEEP,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

INDEX (Continued)

AUTHORITIES

Cases:

AUTHORITIES (Continued)

AUTHORITIES (Continued)

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The petitioner, UNIHEALTH SERVICES CORPORATION, prays that a writ of certiorari issue to

review the order of the Court of Appeals for the Fifth Circuit rendered in these proceedings on June 27, 1979.

OPINIONS BELOW

The Court of Appeals for the Fifth Circuit summarily affirmed the District Court for the Eastern District of Louisiana on June 27, 1979. The Affirmance is reported at ____ F.2d ____. The opinion in the form of a Memorandum and Order of the District Court for the Eastern District of Louisiana was rendered on February 12, 1979, with the Judgment rendered on February 14, 1979, and reported at ____ F.Supp. ____. This judgment dismissed for lack of jurisdiction.

JURISDICTION

The summary affirmance of the Fifth Circuit Court of Appeals was entered on June 27, 1979. See Appendix A, p. 1a, *infra*. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1) and Supreme Court Rule 19(b), in that the Circuits are in conflict with each other, with this Court and the intent of Congress.

QUESTIONS PRESENTED

Petitioner brought suit under the Constitution of the United States and Title 28 U.S.C., Sections 1331,

1333, 1332, 1346(b), 1361, 2201; Title 42 U.S.C. §405(g), 1395, et seq, 1395(ii); Title 42 U.S.C. §1985; The United States Constitution, and the First, Fourth, Sixth, Ninth, Eleventh, and Fourteenth Amendments; and federal and state common law to challenge actions of federal officials who caused ruination of petitioner's private business enterprise as a professional management company of certified Medicare home health agency providers. The remedies sought expressly included injunction, declaratory judgment relative to the unconstitutionality of the actions and a monetary award for costs, interest and attorney's fees for the resulting damages to the business. The remedy impliedly sought was mandamus.

The case being summarily dismissed for lack of subject matter jurisdiction, the questions presented are as follows:

1. Whether the conflict in Circuits is sufficient to justify resolution of the underlying unanswered issue of whether private citizens can be totally deprived of access, review or remedy to challenge governmental harassment.

2. Whether Congress can close the federal courts entirely to constitutional challenges directed against federal statutes or actions.

3. Whether a private corporation, diverse in citizenship, can challenge the tortious actions of federal agency individuals under the Federal Tort Claims Act and applicable state law.

CONSTITUTION, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Constitution of the United States, Article III, Section 1:

> The judicial Power of the United States shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . .

Section 2:

> The judicial power shall extend to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority; . . . to controversies to which the United States shall be a Party; . . . *between citizens* of different States; . . . (Emphasis added).

2. Constitution of the United States, Amendment V, §1:

> . . . nor be deprived of life, liberty, or property, without due process of law . . . .

3. Constitution of the United States, Amendment I (1791):

> Congress shall make no law . . . abridging the freedom of speech . . . or the *right* of the people . . . to petition the Government for *redress* of grievances. (Emphasis added).

4. Constitution of the United States, Amendment IX (1791):

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

5. Constitution of the United States, Amendment XIV (1868):

> All persons . . . in the United States are citizens of the United States and the State wherein they reside . . . nor deny to any person . . . the equal protection of the laws.

6. Constitution of the United States, Amendment IV (1791):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

7. Constitution of the United States, Amendment VI (1791):

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and dis-

trict wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

8. Constitution of the United States, Amendment XI (1795):

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

9. 28 U.S.C. §§1254(1), 1331, 1332, 1333, 1346(a)(2), 1346(b), 1361, 1491 and 2201. (Attached in Appendix).

10. 42 U.S.C. §§405(g) and (h), 1395, et seq., 1395(ii), 1395(x)(n) and 1985. (Attached in Appendix).

11. Rule 19(b) of the Supreme Court of the United States. (Attached in Appendix).

12. Provider Reimbursement Manual, §2133. (Attached in Appendix).

13. Provider Reimbursement Manual, HIM 15 (Too voluminous to copy).

STATEMENT OF THE FACTS

A private, corporate management company known as Unihealth Services Corporation began to suffer governmental harassment in and during the year 1976. This petitioner had home health agency clients as so defined under the Medicare Act, Title 42 U.S.C. §1395(x)(n). Unihealth provided pursuant to contractual arrangements certain professional consultation, orientation programs, data processing services, guidance in financial matters, assistance in audit procedures conducted by fiscal intermediaries who are agents of the Department of Health, Education and Welfare, to these client agencies. (Memorandum and Order, p. 1, United States District Court, Eastern District of Louisiana, Civil Action No. 77-3001, February 12, 1979, Appendix C).

In 1969 through 1976 Medicare officials recognized the private corporate entity as a "management company" under policy considerations set out in the Provider Reimbursement Manual, HIM 15. The respondents communicated adverse reactions to the cost of the Uninealth charges and the manner in which the same were charged on a percentage basis. Unihealth was retroactively deemed a "franchise" and Section 2133 of the Provider Reimbursement Manual was said to apply thusly requiring the Unihealth clients to submit more

documentation in support of their costs on a breakdown, rather than a percentage-based method. The negative presumption was created and Unihealth was provided absolutely no forum to contest the challenge to its change in status.

In short, the complaint alleged treatment of the status of Unihealth as unconstitutional. The government officials acting under the color of federal law communicated adverse, unfair and often erroneous information about Unihealth to its clients, potential users and its competitors. This was alleged to have constituted a serious invasion of contractual rights and relationships. Unihealth's right to do business became thwarted and substantial revenues were lost. Unihealth sought declaration relative to the overly broad, inconsistent and at times nonexistent Medicare regulations applicable to management companies in the Federal District Court.

Because Unihealth is not a provider, there was no statutory right to the administrative hearing provided to providers.

Unihealth irreparably lost money and reputation as clients withheld payments. Unihealth became crippled and unable to service existing clients who relied on its management expertise in order to service Medicare patients. Unihealth lost monies in excess of $10,000.00 and therefore had no access to the Court of Claims for tortious invasion of contractual rights.

The respondents were furthermore challenged for violating Unihealth's trade secrets as well as attempting to conspire to price fix it out of the industry. Respondents discriminated against Unihealth because Unihealth established private, not-for-profit, home health agencies contrary to the style of community or government type institutions. The respondents felt that Unihealth should not make a profit. Unihealth alleged losses in the amount of approximately $1,000,000.00 plus incurred expenses, including legal fees, costs, and the waste of valuable services while it was forced to constantly attempt to justify its existence in a setting which provided no forum to redress these grievances.

JURISDICTIONAL POSTURE OF THE CASE

On October 4, 1977, Unihealth having no other resort or recourse, filed suit against respondents herein requesting immediate injunction, declaratory relief and money damages. After extensions of time were granted, the defendant therein filed a motion for dismissal for lack of standing and subject matter jurisdiction under the Medicare Act.

On March 21, 1978, the District Court rendered a decision and order granting jurisdiction and finding that Unihealth very much had standing to challenge the actions of the defendants. *Unihealth Services Corporation v. Califano,* 448 F.Supp. 1059 (E.D. La. 1978). The Court concluded the following regarding the relief sought:

* * *

The Court agrees with Unihealth that it has raised more than a request for a review of its charges to providers. Just as plaintiff has characterized its claims, Unihealth is demanding both that it be allowed access to the review procedures provided by the Medicare Act and that it be regulated within due process parameters since the alleged regulations have purportedly interfered with both contractual and occupational relationships of plaintiff.

* * *

First, it is evident that the alleged challenged actions, i.e., no access to administrative and judicial review under the Medicare Act and the constitutionality of the regulations imposed on plaintiff, have caused the plaintiff economic harm and otherwise in affecting its relationships with the providers such that providers are withholding certain sums purportedly owed Unihealth.

Second, as stated in *Cotovsky, supra,* the Court is to assume that plaintiff arguably falls within the zone of interest protected by its Fifth Amendment rights when it challenges governmental action on Fifth Amendment grounds.

Whether or not Unihealth arguably falls within the zone of interest regulated by the

Medicare Act turns on a determination of the nature and extent of alleged regulating activities. *Cotovsky, supra.* Since a factual issue remains regarding the nature and extent that Unihealth has been regulated, the Court must resolve this issue on the merits before it can render a decision on standing under the Medicare Act. Courts have recognized that they may postpone a decision on a jurisdictional issue if that issue is intertwined with a decision on the merits of the case. *Continental Casualty Company v. Department of Highways, State of Louisiana,* 379 F.2d 673 (5th Cir. 1967). Therefore, while the Court has already concluded that this plaintiff has standing under the Fifth Amendment to bring the claims, ...

On the issue of federal question jurisdiction, the Court distinguished *Califano v. Sanders,* 403 U.S. 99, 97 S.Ct. 980 (1976), because *Sanders did* have a forum for judicial review as provided for under Section 405(g) of the Social Security Act.

The Court expressed grave concern as to the repercussions if federal courts were entirely closed to constitutional challenges. The District Court quoted from the post-*Salfi* decision in *South Windsor Convalescent Home, Inc. v. Matthew,* 541 F.2d 910 (2d Cir. (1976):

> However, when *Salfi*'s conclusions apply to a case where no alternative jurisdictional basis

exists, its restrictive interpretation of §1331 might lead to a constitutional question of the first order, one that has arisen but rarely and tangentially in our constitutional history, i.e., whether the Congress can close the federal courts entirely to constitutional challenges directed against federal statutes or actions. We doubt that the Supreme Court intended its reading of §405(h) in *Salfi* to have the effect of precluding federal jurisdiction over constitutional questions, since the result would be at odds with the well-established principle that a court will not construe a statute to restrict access to judicial review unless Congress manifests its intent to do so by "clear and convincing evidence."

The Court also found authority pursuant to *St. Louis University v. Blue Cross Hospital*, 537 F.2d 283 (8th Cir. 1976); *John T. MacDonald Foundation, Inc. v. Mathews*, 534 F.2d 633 (5th Cir. 1977); and concluded that the Medicare Act cannot be interpreted as closing these doors:

> Regardless of how each court has applied §405(h) of the Medicare Act, they have all emphasized one caveat — the Medicare Act cannot be interpreted as closing the federal courts to the presentation of a constitutional challenge to the Act itself. Additionally, these courts have agreed that the constitutional

> challenge to the Act must be brought *under the Medicare Act* before §405(g) and (h) can be applied to such a claim. *Salfi, supra.*
>
> * * *
>
> Accordingly, on the basis of the foregoing reasons, this Court first concludes that Unihealth Services Corporation has standing under the Fifth Amendment to the United States Constitution to assert its constitutional challenges . . . . Second, this Court also concludes that Unihealth has subject-matter jurisdiction pursuant to 28 U.S.C. 1331 to have the constitutional challenges to the Medicare Act reviewed by this Court. The motion of the United States to dismiss the claim brought by Unihealth Services Corporation is hereby DENIED. (Emphasis in original).

The trial of the matter was heard on the merits on June 19, 1978. Just prior to the trial, the Fifth Circuit's reversal decision *en banc* in *John T. MacDonald Foundation*, was rendered at 571 F.2d 328 (5th Cir. 1977), *writ denied*, ____ U.S. ____. The District Court took the matter under submission until rendering its memorandum and order of dismissal on February 12, 1979, and held on page 5 thereof:

> Consideration of the Fifth Circuit en banc decision in *MacDonald Foundation, Inc., supra*, and its more recent decision in *The American Asso-*

> *ciation of Councils of Medical Staffs of Private Hospitals, Inc. (CMS) v. Califano,* 575 F.2d 1367 (5th Cir. 1978) leads to the inescapable conclusion that this Court has no federal question jurisdiction pursuant to 28 U.S.C. 1331 over the present action.

The Notice of Appeal to the Fifth Circuit was filed on February 20, 1979. On May 21, 1979, a Motion for an Injunction Pending Appeal and/or Preferential Hearing pursuant to Rule 8 of the Federal Rules of Appellate Procedure was filed with supporting affidavits. In response, appellee filed a Motion for Summary Affirmance in response to appellant's Motion for Injunction Pending Appeal and/or Preferential Hearing (June 8, 1979). The Court of Appeals received the appellant's opposition to said motion on June 18, 1979, and the decision of the Court of Appeals granting summary affirmance and denying the motion for injunction pending appeal was filed on June 27, 1979. No written decision accompanied the same.

JURISDICTION OF FEDERAL COURTS

A. 28 U.S.C. §1332.

Unlike the authorities used to dismiss the case in the District Court, jurisdiction was originally invoked on the basis of diversity of the parties, 28 U.S.C. §1332. The pendent state tort claims asserted against the individual defendants impliedly arose under the counts, facts and allegations complained of including invasion

of private contractual rights and conspiracy committed by agents of the federal government who acted beyond and outside the scope of their authority under color of law. These individuals were named as defendants and included Joseph Califano, Melvin Blumenthal, Marion J. Seabrooks, Mike Hoban, Joseph Brewster, Raymond Woerner, Irvin Cohen, Blue Cross Association of America, Inc. and James Sleep. None of these individuals reside in Louisiana or Delaware which is the State in which Unihealth is a citizen. Pendent state claims do derive jurisdiction from 28 U.S.C. §1331. *See, Bivens v. Six Unknown Named Agents of the FBI,* 403 U.S. 388 (1971).

Unihealth alleged and proved at trial an invasion of its right to privacy. Under Louisiana state law, La. C.C. Art. 2315, and Federal common law, *Bivens, supra,* the right is recognized and its invasion is actionable. *Bivens, supra,* 403 U.S. at 394 (1971). The business in which Unihealth was engaged is not regulated by the Medicare Act because Unihealth is not a provider.

At the trial in the District Court, exhibits were introduced which proved that the Medicare Bureau or Blue Cross representatives recognized Unihealth's right to privacy. Yet, their cautions were blown to the wind as Unihealth became exposed and exploited without a hearing relative to the truth of its business. *See, Bivens, supra,* 403 U.S. at p. 394-395, quoting *United States v. Lee:*

> . . . "In such cases there is no safety for the citizen, except in the protection of the judicial

> tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime." *United States v. Lee*, 106 U.S. 196, 219 (1882) . . . .

These intentional, negligent, or conspiratorial actions on the part of the respondents allegedly violated the Fourth Amendment. This Court has held in *Bivens, supra*, at p. 395:

> . . . That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of person interests in liberty. See *Nixon v. Condon*, 286 U.S. 73 (1932) . . . .

B. Court of Claims is not the answer.

The Court of Claims does not have jurisdiction over the federal tort claims. Federal district courts do have such jurisdiction as was implied in this case. 28 U.S.C. §1346 sets out that district courts shall have original jurisdiction *concurrent* with the Court of Claims, of ". . . (2) any other civil action or claim against the United States *not exceeding* $10,000 in amount, founded either upon the Constitution, or any Act of Congress . . . or for liquidated damages *not sounding in tort.*" (Emphasis added).

In the case at bar, Unihealth has no contract with the federal government. Therefore, Unihealth has no Court of Claims relief. Furthermore, the claim exceeds $10,000 and does sound in tort. Unihealth tried to file this case in tort in the Court of Claims and had the same kicked back. The tort claims could not be heard by the Court of Claims. Instead, the tort claims, particularly as they exceed $10,000, should have been heard in the district court. This is not a case for reimbursement as in the case of *Humana of South Carolina v. Matthews*, 419 F.Supp. 253 (D. D.C. 1976).

At the same time, state and common law govern and constitute as illegal the actions of the individually named and diverse defendants. Hereinbelow, as a reason for granting this writ, it is submitted that the federal law does govern the scope of authority of the individuals so sued. Furthermore, they should not be given blanket sovereign immunity by the way of a closed federal door to review their actions. The remedy is one of injunctive relief and/or money damages. *See*, Hill, "Constitutional Remedies," 69 Col. L. Rev. 1109, 1143-46 (1969); Katz, "The Jurisprudence of Remedies," 117 U. Pa. L. Rev. 1, 51-58 (1968).

The individuals sued had a major responsibility to carry out the dictates of the Medicare Act pursuant to delegations of legislative authority. In exceeding the scope of authority, they committed actionable and remedial malpractice of their respective professions. However, the Court of Claims does not have jurisdic-

tion over malpractice actions, nor can it award costs, interest or attorney's fees for the harm that was committed.

The defendants in question do not deserve the endowment of governmental immunity. Immunity is not readily implied. *Kiefer and Kiefer v. Reconstruction Finance Corporation,* 306 U.S. 381, 388-89. In short, the Federal Tort Claims Act should have been applied here or "should have been construed to fit, so far as would comport with its words, into the entire statutory system of remedies against the government to make a workable, consistent and equitable whole." *Feres v. U.S.,* 340 U.S. 139, 71 S.Ct. 153, 95 L.Ed. 152.

The respondents exerted and exceeded their governmental authority in such a way and design as to deleteriously affect the affairs of the corporate citizen. To a business, this kind of damage causes great suffering. Public officials may become tortfeasors by exceeding the limits of their authority. *Land v. Dollar,* 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); *Belknap v. Schild,* 161 U.S. 10, 18-20; *United States v. Lee,* 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171.

The Court of Claims cannot entertain this particular kind of suit. Its powers do not include providing remedies under the equitable or declaratory relief sought. *United States v. Alire,* 73 U.S. (6 Wall.) 573, 18 L.Ed. 947 (1868); *United States v. Jones,* 131 U.S. 1, 9 S.Ct. 669, 33 L.Ed. 90 (1886); *United States v. King,* 395 U.S. 1,

89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). Nominal damages such as those recognized in *The American Association of Council of Medical Staffs v. Califano,* 575 F.2d 1367 (5th Cir. 1978) (hereinafter called *"CMS"*), stated that the Medicare Act withdraws jurisdiction from district courts over actions like *CMS* and *Dr. John T. MacDonald Foundation, Inc. v. Califano, supra.* But, nominal damages for contesting actions pursuant to the Medicare Act are not enough. *Carey v. Piphus,* ____ U.S. ____, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), and *Pushkin v. Califano,* ____ F.2d 6722 (August 8, 1979, Slip Opinion, No. 77-2401).

The relief sought runs to the very basis of constitutional protections. Jurisdiction is asserted herein in order to assure constitutional protection, including whether or not the court itself affords a constitutional protection in being an available forum with sufficient remedy. Without the remedy, the right to review is a farce.

The Fifth Circuit could not decide that Congress could cut off jurisdiction of these issues while providing another court. *CMS, supra,* but this Court *can* decide the issue and should decide that Congress cannot cut off jurisdiction of these issues.

C. Federal Coercion Cannot Be Shielded from Attack

Furthermore, Unihealth sought the federal court in complaining of extrajudicial governmental coercion. Traditionally, relief can be obtained under general

jurisdiction. 28 U.S.C. §1331. *Wong Wing v. U.S.*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896); *Ng Fung Ho v. White*, 259 U.S. 276, 41 S.Ct. 148, 65 L.Ed. 446 (1922); *Marbury v. Madison*, 1 Cranch. 137, 2 L.Ed. 60.

Can Congress by enactment of the Medicare Act close the doors of federal courts from *injured* persons who have no other voice? The theory of sovereign immunity has been reiterated and recreated in the unresolved issues stated in *Pushkin v. Califano, supra*. It is all because the Court of Claims in *Whitecliffe, Inc. v. United States*, 536 F.2d 347, 210 Ct. Cl. 53 (1976), *cert. denied*, 430 U.S. 969, 97 S.Ct. 1652, 52 L.Ed. 2d 361 (1977), conflicted with the interpretation of the Social Security Act, Section 405(h), in affording an available forum for jurisdictional challenges than the Fifth Circuit. The conflicts in Circuits and conflict in the Court of Claims need clarification as will be explained below in the reasons for granting writ.

D. Actions Against the Government.

The action was clearly not a "Medicare case." Obviously, the Fifth Circuit treated it as another *Pushkin v. Califano, supra*. Instead, the *Unihealth* case included a personal action against officers and/or agents of the United States who failed to act properly under color of legal authority. *See, United States v. Candelaria*, 271 U.S. 432, 44, 46 S.Ct. 561, 70 L.Ed. 1023 (1926); *Drummond v. U.S.*, 324 U.S. 316, 318, 65 S.Ct. 659, 89 L.Ed. 969 (1945). The entire defense of this action was conducted by the government lawyers; however, courts have still held

the jurisdictional doors are open to these kinds of personal attractions. *Land v. Dollar, supra. See* note, "The Dollar Litigation, a Study in Sovereign Immunity." 65 Harv. L. Rev. 466-478-78 (1952).

One method by which federal courts have recognized the obligation to hear cases of federal injustice such as this is by means of mandamus and Venue Act. 28 U.S.C. §1361. This was also addressed in the *Pushkin v. Califano, supra*, case, wherein the Fifth Circuit recognized more conflicts in circuits relative to the interpretation of mandamus under 28 U.S.C. §1361 for challenging the legal acts of the Secretary of H.E.W. in promulgating allegedly invalid regulations. *American Association of Council of Medical Staffs v. Califano*, 575 F.2d 1367 (5th Cir. 1978). That case conflicts with *Cervoni v. Secretary of H.E.W.*, 581 F.2d 1010 (1st Cir. 1978). In *CMS, supra*, the Court opined in dicta that mandamus may be a form of independent jurisdiction. This conflicts with *Cervoni, supra*, as well as *Elliot v. Weinberger*, 564 F.2d 1219 (9th Cir. 1977), *cert. granted*, ____ U.S. ____, 99 S.Ct. 75, 58 L.Ed.2d 106 (1978); *White v. Matthews*, 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978).

A mandamus and injunction as sought in the case at bar can be arguably different. *Smith v. Bourbon County*, 127 U.S. 105 (1888). The common law writ of mandamus in a federal jurisdiction could be the equivalent of a mandatory injunction. The courts and particularly the Circuits argued to be in conflict herein are unclear.

See, note, "Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts: A Study in Procedure Manipulation," 38 Colum. L. Rev. 903 (1938); Davis, "Mandatory Relief from Administrative Actions in Federal Courts," 22 U. Chic. L. Rev. 585 (1955).

JURISDICTION OVER CONSTITUTIONAL QUESTIONS

The Supreme Court has recently expressed doubts about the constitutionality of foreclosing all avenues of review and remedy of constitutional issues. *Johnson v. Robison,* 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974). As was footnoted in *CMS, supra:*

4. The Court has recently expressed doubts about the constitutionality of foreclosing all review of constitutional issues:

> "There is another reason why *Johnson v. Robison* is inapposite. It was expressly based, at least in part, on the fact that if §211(a) reached constitutional challenges to statutory limitations, then absolutely no judicial consideration of the issue would be available. Not only would such a restriction have been extraordinary, such that 'clear and convincing evidence would be required before we would ascribe such intent to Congress,

> [citations omitted] but it would have raised a serious constitutional question of the validity of the statute as so construed."

Weinberger v. Salfi, 422 U.S. at 762, 95 S.Ct. at 2465.

A thorough discussion of this whole area is found in P. Bator, P. Mishkin, D. Shapiro, and H. Wechsler, The Federal Courts and the Federal System, Note on the Power of Congress to Limit the Jurisdiction of Federal Courts, 313-375 (2d ed 1973). *See also Caulfield v. U.S. Dept. of Agriculture,* 5 Cir. 1961, 293 F.2d 217 (en banc); K. Davis, *Administrative Law in the Seventies,* §2809 (1976); L. Jaffe, *Judicial Control of Administrative Action,* 376-94 (1965).

Happily, the Fifth Circuit has done its best to enunciate that the issues need not be decided. As will be shown in the reasons for granting the writ hereinbelow, the issue does need to be decided since mandamus is insufficient, Court of Claims jurisdiction is insufficient, and the Circuits are in extreme conflict in the interpretation of Section 405(g) of the Social Security Act entirely precluding any review. In its summary affirmance, the Fifth Circuit did not even give Unihealth the benefit of this kind of statement. Perhaps the Fifth Circuit could not have happily done so; however, the issue is more applicable than ever. See, Reason No. 1, for granting certiorari, below.

REASONS FOR GRANTING THE WRIT, OR CONSOLIDATING THIS CASE WITH ELLIOT v. WEINBERGER 564 F.2d 1219 (9th Cir. 1977), cert. granted, ____ U.S. ____, 99 S.Ct. 76 (1978)

1. The Decision Of The Fifth Circuit Directly Conflicts With Other Circuit Decisions, The Decisions Of The United States Supreme Court And Deprives Petitioner Herein Of Any Remedy, Review Or Court.

MacDonald Foundation, supra, (5th Cir.), directly conflicts with *St. Louis University, supra,* (8th Cir.). The application of general jurisdiction grants of 28 U.S.C. §§1331(a) and 1346(a)(2) have been differently applied. Particularly, certain Circuits have found that the Court of Claims possesses a greater jurisdictional basis under 28 U.S.C. §1491 than federal district courts under 28 U.S.C. §1331. District courts have been found to lack §1331 jurisdiction to review Medicare disputes while the Court of Claims is allowed to hear the claims. *Humana of South Carolina v. Matthews, supra; Whitecliffe, Inc. v. U.S., supra, CMS, supra* (5th Cir.).

This court should clarify the matter once and for all. A regulation itself can be reviewed by the Court of Claims; however, the actions of the individuals and the harm that was created thereby is not a matter of review by the Court of Claims. Instead, that would arguably be a matter for resolution by mandamus. *Plekowski v. Ralston-Purina Company,* 557 F.2d 1218 (5th Cir. 1977).

The issue of whether mandamus will lie pursuant to 28 U.S.C. §1361 to grant district courts jurisdiction over constitutional challenges to the Medicare Act is presently before this Court. *Elliot v. Weinberger,* 564 F.2d 1219 (9th Cir. 1977), *cert. granted,* ____ U.S. ____, 99 S.Ct. 76 (1978).

The case is significant because of the due process challenge to the recoupment procedures. In the case at bar, the due process challenge is also significant because there were no hearing proceedings available to the non-regulated, non-provider Unihealth. There could be no exhaustion of administrative remedies where there was never a remedy originally available despite petitioner's being well within the zone of interest regulated by the Medicare statute. *Cotovsky-Kaplan Phys. Th. Assoc., Ltd. v. United States,* 507 F.2d 1363 (7th Cir. 1975). Unihealth does not seek reimbursement for the cost of its services. Unihealth charges for the service pursuant to agreements which were challenged by the Medicare Bureau without a proper hearing. Unihealth was not even a party to those hearings. In *Elliot v. Weinberger, supra,* at p. 1226, the court considered this fact significant:

> Nor are the present suits precluded by 42 U.S.C. §405(h) which controls judicial actions to recover benefits. *Weinberger v. Salfi,* 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975) interprets §405(g). The instant suits are quite different. They assert a constitutional right to

> due process notice and hearing when alleged overpayments are recouped. *They are not claims for benefits.* Nor would granting the relief sought result in an entitlement to benefits. *The distinction between due process questions divorced from a claim for benefits and questions related to the merits of a benefits claim is a significant one, requiring considerably different treatment by the courts. See Eldridge, supra,* 424 U.S. at 329-332, 96 S.Ct. 893. (Emphasis added).

Nevertheless, the Circuits are still at odds. See *Ryan v. Shea,* 525 F.2d 268, 272 (10th Cir. 1975); *Humana of South Carolina, Inc. v. Matthews, supra.*

Furthermore, mandamus cannot be used to enforce money damages. Therefore, the conflict in circuits encourages piecemeal litigation on the issue. For example, Unihealth would have to begin its case in the Court of Claims for less than the $10,000 jurisdictional amount and seek clarification relative to the contested regulation on "reasonable cost" and "franchise" under the Medicare Act. Unihealth would then have to file a separate claim asking for a mandamus to enforce the federal officials acting under color of Medicare law to stop and desist from committing illegal acts pursuant to the Medicare Act in federal district court. Thirdly, Unihealth would have to file a suit in state court asking for money damages over and above the $10,000 for the illegal pendent state claims which include violations of the competitive rights and first amendment rights, since the Court of Claims cannot entertain jurisdiction over First Amendment claims. *United States v. Alire,* 73 U.S. (6 Wall.) 573, 18 L.Ed. 947, *United States v. Jones, supra, United States v. King, supra.* The Federal Tort Claims Act does not provide injunctive nor declaratory relief. Therefore jurisdiction will not lie under 28 U.S.C. §1346(b).

Declaratory and injunctive relief is procedurally recognized in Title 28 U.S.C. §2201. However, it has long since been decided that district courts do not have an independent grant of jurisdiction over the declaratory judgment act, 28 U.S.C. §2201. *Weinberger v. Salfi, supra; Califano v. Sanders, supra.*

The reason for granting the writ is simple. This case has the earmarkings of a major jurisdictional challenge. There are extreme conflicts in the Circuits and a conflict with the United States Supreme Court in *Johnson v. Robison, supra.* To deprive this citizen of an adequate forum to address these same factual claims is itself unconstitutional.

If this Court denies writ, private enterprise will suffer a death blow. The constitutional challenge to the Medicare Act presented herein includes whether federal officials acting under Medicare Act "immunity" can validly destroy private business. The further constitutional challenge is to the Medicare Act itself, Section 405(g). This Act has been interpreted in a conflicting manner and in such a way as to completely preclude review of the illegal and unconstitutional actions of H.E.W. officials.

MacDonald Foundation, supra, does not control this request, although it was found to be applicable by the district court. The conflicts in Circuits arise out of each circuit's looking for some kind of out in order to avoid this very important issue. This has forced a conflict vis-a-vis mandamus jurisdiction and opting to the Court of Claims. The federal questions herein have not heretofore been specifically determined by this Court. The Circuits only paid lip service to the mandate in *Johnson v. Robison, supra.* Just as in *Johnson, supra,* this is not a case where *certain* construction of the Medicare Act is "fairly possible" and as such constitutional doubt may be avoided. Constitutional rights and doubts may not be avoided in this situation since Unihealth was never governed nor regulated by Section 405(h) of the Social Security Act. Unihealth was singled out for attack for the very reason that it could not challenge these actions. (Transcript, Testimony, I. Cohen). No proper *hearing,* either by right, equity or statute, was ever afforded Unihealth.

In *Pushkin v. Califano, supra,* the issue relative to Equal Protection *was heard* by this Court. *See, Pushkin, supra,* where it was held that plaintiffs could raise a substantial constitutional claim if they could show that Congress "in distinguishing between the diagnostic services provided by optometrists and doctors of medicine, for purposes of Medicare reimbursement, acted irrationally." *Rastetter v. Weinberger,* 379 F.Supp. 170, 173 (D. Ariz. 1974), *aff'd.,* 419 U.S. 1098, 95 S.Ct. 767, 482 L.Ed.2d 795 (1975).

Unihealth was singled out and the complaint which addressed the issue of *singling out* Unihealth, is an Equal Protection claim which raises a substantial constitutional question not *preempted by* Section 405(g) of the Medicare Act. *Pushkin, supra.* This Court should decide and resolve the conflicts of whether in the presence of a substantial constitutional claim, jurisdiction will lie under Section 1331. *Cervoni v. Secretary of H.E.W., supra; Kechijian v. Califano,* 453 F.Supp. 159 (D.R.I. 1978). The Circuits are straining for guidance and continually in conflict.

The question can no longer be skirted by Circuit courts. If this Court does not act in aid of its own jurisdictional powers to protect citizens from the arbitrary, unfair and illegal practices of the agents of government, the very spirit of the federal court system will be thwarted. This case goes the farthest in describing a petitioner with absolutely no other forum.

Lastly, this *is not a reimbursement case* such as *MacDonald, supra.* This *is not* a "physician services case" as *CMS, supra.* This is a case of unequal classification and unequal protection. This is a case where the *due process* challenge to the procedures employed by the agency are only collateral to reimbursement disputes. This is not a reimbursement dispute and therefore should not have been barred from review. *Humana, supra; Trinity Memorial Hospital v. Associated Hospital Services,* 570 F.2d 660 (6th Cir. 1977); *Elliot v. Weinberger, supra; St. Louis University v. Blue Cross Hospital Service, supra; Ryan v. Shea supra; Schwatzberg v. Califano,* 453 F.Supp. 1042 (S.D. N.Y. 1978). This Court has been finally presented with the

precise issue of due process and equal protection under the Constitution.

Finally, the defendants themselves were sued under color of their offices, but the Fifth Circuit did not take heed of the Federal Torts Claim action prompted by the wrongful, tortious and conspiratorial actions of the respondents. The last and final reason for granting certiorari is that these individuals should not be given further blankets of sovereign immunity. *Larson v. Domestic and Foreign Corporation,* 337 U.S. 682 (____). The longer federal courts persist in skirting the issue and finding ways not to challenge these kinds of actions, the greater the authority Medicare officials will feel they have to abrogate the constitutional rights of individuals collaterally acting to it.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted, or in the alternative, joined with the granted writ in *Elliot v. Weinberger* now before this Court.

Respectfully submitted,

DONNA D. FRAICHE
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New Orleans, Louisiana 70115
Telephone: (504) 895-8673
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that this ____ day of September, 1979 that I have served three copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon Henry R. Goldberg, Office of the General Counsel, Department of Health, Education and Welfare, 6201 Security Blvd., Baltimore, Maryland 21235 and Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 and one copy upon John P. Volz, United States Attorney, 500 Camp Street, New Orleans, Louisiana 70130, Attorneys for Respondents, by mailing same, postage prepaid, addressed to their respective offices.

DONNA D. FRAICHE

DONNA D. FRAICHE

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1558

UNIHEALTH SERVICES CORPORATION,
Plaintiff-Appellant,

versus

JOSEPH P. CALIFANO, Sec. of H.E.W., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

Before AINSWORTH, GODBOLD and VANCE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellees for summary affirmance is GRANTED.

IT IS ORDERED that appellant's motion for injunction pending appeal is DENIED.

/s/ JUDGE ROBERT A. AINSWORTH, JR.
/s/ JUDGE JOHN C. GODBOLD
/s/ JUDGE ROBERT S. VANCE

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNIHEALTH SERVICES CORPORATION,

versus CA No. 77-3001

JOSEPH P. CALIFANO, SECRETARY Of HEALTH, EDUCATION AND WELFARE, MELVIN BLUMENTHAL, MARION J. SEABROOKS, MIKE HOBAN, JOSEPH BREWSTER, RAYMOND WOERNER, I. COHEN, BLUE CROSS ASSOCIATION OF AMERICA, INC. and JAMES SLEEP

Filed: Feb. 14, 1979

JUDGMENT

This matter came on for hearing before the Court on a previous day.

After hearing the evidence, the Court took the matter under submission.

NOW, THEREFORE, for the written reasons of the Court on file herein, and considering the direction of the Court as to the entry of judgment; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Joseph P. Califano, Secretary of Health, Education and Welfare, Melvin Blumenthal, Marion J. Seabrooks, Mike Hoban, Joseph Brewster, Raymond Woerner, I. Cohen, Blue Cross Association of America, Inc., and James Sleep, and against plaintiff, Unihealth Services Corporation, dismissing said plaintiff's suit, with costs.

Dated at New Orleans, Louisiana, this 14th day of February, 1979.

/s/ NELSON B. JONES
NELSON B. JONES, CLERK

/s/ ILLEGIBLE
Deputy Clerk,
United States District Court
Eastern District of Louisiana
New Orleans, La.

APPROVED AS TO FORM:
/s/ JACK M. GORDON
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNIHEALTH SERVICES CORPORATION

versus CA No. 77-3001(I)

JOSEPH P. CALIFANO, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH, EDUCATION & WELFARE OF THE UNITED STATES, ET AL

Filed: Feb. 12, 1979

Mrs. Donna D. Fraiche, Suite 542, First National Bank of Commerce Building, New Orleans, Louisiana 70112

Mrs. Edith S. Marchall, Department of Health, Education & Welfare, General Counsel's Office, 330 C Street, S.W., Washington, D.C. 20201

Henry R. Goldberg, Esq., Department of Health, Education & Welfare, Office of General Counsel, 6201 Security Boulevard, Baltimore, Maryland 21235

GORDON, J.

MEMORANDUM AND ORDER

Plaintiff, Unihealth Services Corporation, is a private professional management and consulting firm specializing in the rendering of service to nonprofit home health agencies (as providers) as those entitled are so defined in the Medicare Act. 42 U.S.C. 1395(x) (m). Unihealth has serviced 25 provider clients pursuant to a contract with each individual home health agency wherein a unified charge is billed for various services rendered based on the percentage of gross billings of the respective agencies as set out in the agreement. Among the services provided by Unihealth are professional consultation and orientation programs, data processing services, guidance in financial matters, and assistance in audit procedures conducted by fiscal intermediaries as agents of the Department of Health, Education and Welfare. The Department of Health Education and Welfare has responsibility for administering the Medicare program, and in fulfilling those duties, promulgates regulations and establishes policy relating to the administration of the Medicare program. Unihealth is presently attacking certain administrative practices and policies of the Department of Health, Education and Welfare.

From 1969 through 1976 Medicare officials recognized Unihealth as a management company under policy considerations set out in the Provider Reimbursement Manual. Medicare officials, in making their determination as to the reasonableness of cost regarding Unihealth's services to the providers scrutinized

those costs under guidelines found appropriate to management companies. From 1970 until November, 1976, the fees Unihealth charged its clients were found to be within the principles of reimbursement and thus allowed.

In 1977, Medicare officials made a policy determination that Unihealth should be regarded as a franchisor under the Provider Reimbursement Manual rather than as a management company. Plaintiff has now attacked on constitutional grounds the legality of such a policy of determination, of the method of promulgating that determination, and of the manner in which the policy decision was applied.

As alleged by plaintiff, in 1968 officials of Medicare began to review the status of the plaintiff in an effort to make a policy determination as to whether Unihealth should be regarded as a management company or as a franchisor under the Provider Reimbursement Manual. Plaintiff claims that such a review was made without the knowledge of its representatives. Purportedly without giving plaintiff legal notice of any meetings, officials of Medicare met and reached a policy decision that Unihealth should be treated as a franchisor when Medicare officials make a determination on reimbursement. Under §2133 of the Provider Reimbursement Manual, franchise fees are allowable only to the extent that they are not out of line with costs of similar services provided by nonfranchise organizations. This section requires that providers establish the

cost of each of the specific services provided by the franchisor. It requires exclusion of any additional fees relating to the franchisor's trademark or reputation which are purportedly not related to patient care.

As a result of this policy determination recognizing Unihealth as franchisor, the plaintiff contends that those standards applicable to franchisor in determining reasonable costs, were applied retroactively to those years when plaintiff was operating as a management corporation as designated by the Medicare Act (also referred to as "Act"). Retroactive application of standards relating to franchisors purportedly altered the condition under which plaintiff was operating in the following manner:

(1) That Medicare officials retroactively conducted a more rigorous scrutiny of Unihealth's cost report than was required when Unihealth was accorded management status;

(2) That Unihealth was required to provide itemized cost statements of each individual service rendered to a provider whereas in the past under standards applicable to management corporations, it did not have to itemize costs as to individual services;

(3) That under the franchisor standards, and as referred to above, Unihealth was forced to retroactively utilize more onerous accounting procedures in set-

ting out the costs of the services rendered;

(4) That the presumption that all costs and services stated by a management corporation are reasonable was substituted for the franchisor presumption that all costs and services rendered are not reasonable and must be proven by detailed documentation.

Plaintiff contends that as a result of this rectoactively applied policy determination recognizing it as a franchisor, Unihealth's provider clients have withheld almost all payments outstanding to Unihealth in the full amount of $800,000.

In summarizing its contentions, Unihealth alleges, in the main, that the defendant has infringed its due process rights under the Fifth Amendment of the United States Constitution: (1) by singling out the plaintiff in an attempt to regulate it under the Medicare Act without allowing plaintiff any administrative review or judicial review as provided by the Medicare Act; (2) by failing to give plaintiff guidelines further defining "reasonable cost" pursuant to Title 20, Code of Federal Regulations, §405.501, et seq.; (3) by failing to give the plaintiff proper or legal notice that its charges for services would be disallowed based on retroactively applied policy decisions affecting cost reports for the years 1976, 1975 and 1974; (4) by retroactively applying the policies, practices, actions, and determinations of defendant so as to force plaintiff out of its professional

practice thereby proscribing its ability to engage in its profession; (5) by denying plaintiff the right to a hearing relative to the issue of its status as a franchisor, though defendant's precedential policy determination had the adverse effect of depriving Unihealth of its presumption of having submitted reasonable costs on a unified basis.

On a motion to dismiss brought pursuant to FRCP 12(b)(1), the Department of Health, Education and Welfare of the United States, sought to dismiss the action on grounds that (1) the plaintiff lacks standing in this action so as to make it a case or controversy subject to the federal court's Article III jurisdiction under the United States Constitution; and (2) that the Court does not have subject matter jurisdiction of the case in that Section 405(h) of the Social Security Act, incorporated into the Medicare provisions at 42 U.S.C. 1395(ii), prevents this Court from exercising any judicial review over the particular claims presented by plaintiff. Section 405(h) reads as follows:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under Section 41 of Title 28 to recover on any claim arising under this subchapter.

After oral argument on the issues, and post argument briefing, this Court took the matter under submission. In a written memorandum the Court denied the motion to dismiss concluding that plaintiff had standing and that the Court had federal question jurisdiction to entertain constitutional claims against the Medicare Act and regulations promulgated pursuant to the Act relying heavily on the decisions in *Dr. John T. MacDonald Foundation, Inc. v. Mathews,* 554 F.2d 714 (5th Cir. 1977) and *St. Louis University v. Blue Cross Hospital Service,* 537 F.2d 283 (8th Cir. 1976).

In preparation for trial, the parties formulated a detailed pretrial order. In paragraph 5 of the pretrial order, defendant stated that it would ask the Court to reconsider the motion to dismiss.

The trial of this matter commenced on June 19, 1978. At the completion of the trial, the defendant orally requested that the Court reconsider its earlier ruling on the motion to dismiss, since the Fifth Circuit in an en banc decision had reversed its position in *Dr. John T. MacDonald Foundation, Inc. v. Mathews, supra. Dr. John T. MacDonald Foundation, Inc. v. Califano,* 571 F.2d 328 (5th Cir. 1978). After allowing additional oral argument on the motion to reconsider and inviting the parties to file post-trial memoranda should they desire, this Court took the motion to reconsider and the issues raised at trial under submission.

Consideration of the Fifth Circuit en banc decision in *MacDonald Foundation, Inc., supra,* and its more recent decision in *The American Association of Councils of Medical Staffs of Private Hospitals, Inc. (CMS) v. Califano,* 575 F.2d 1367 (5th Cir. 1978) leads to the inescapable conclusion that this Court has no federal question jurisdiction pursuant to 28 U.S.C. 1331 over the present action.

In its original memorandum and order, this Court found the reasoning in *St. Louis University, supra,* highly persuasive, where that Court concluded that the Medicare Act [§405(h) of the Social Security Act] could not be read to preclude all judicial review of constitutional claims against the Act. In that case, St. Louis University as a representative of a provider brought an action pursuant to 28 U.S.C. 1331 challenging the constitutionality under the due process clause of certain regulatory procedures used. Allegedly, the Department of Health, Education and Welfare utilized a provider appeals committee with the majority of its membership composed of officers or employees of the very agency whose initial decision was being appealed. Undoubtedly these members had an institutional interest in the outcome.

The Department of Health, Education and Welfare took the position that judicial review of the due process claim was barred by §405(h) and administrative review was precluded by an agreement between Health, Education and Welfare and Blue Cross which established the provider appeals committee. Health, Educa-

tion and Welfare stated that it would not review the appeal committee's decision even when a provider asserted that the committee had blatantly ignored governing statutes, regulations, and constitutional requirements. The Eighth Circuit agreed with the district court's conclusion that St. Louis University could bring a due process claim challenging certain procedures of the Medicare Act under federal-question jurisdiction. In doing so, the Eighth Circuit stated three reasons for concluding that jurisdiction existed under 28 U.S.C. 1331. First, the Court decided that the due process claim arose primarily under the Constitution rather than under the Medicare Act so that the last sentence in Section 405(h) did not apply to such claims. St. Louis University was primarily seeking a constitutionally adequate hearing and not a declaration of entitlement to reimbursement. Second, the Court recognized that the Medicare Act failed to provide an adequate alternative means of obtaining judicial review of St. Louis University's due process claim. The Court found that this ground alone distinguished the case from *Weinberger v. Salfi,* 422 U.S. 749, 95 S.Ct. 2457 (1975) where the Supreme Court held that a federal court had no federal question jurisdiction over a constitutional claim attacking a Medicare Act regulation. Third, the Court merely reasserted the caveat raised by other courts considering similar issues involving jurisdiction under Medicare; reading Section 405(h) to wholly preclude the adjudication of a party's due process claim would raise serious constitutional problems concerning the Medicare Act.

It was then clear to this Court that the reasoning of the Court in *St. Louis University, supra,* was applicable to the present matter since Unihealth was primarily seeking to obtain due process rights rather than the right to reimbursable fees, and was being denied any judicial review procedure under the Medicare Act. A reading of Section 405(h) to preclude any judicial review of these constitutional claims appeared to raise particularly grave constitutional questions concerning the Medicare Act since Unihealth had previously been denied all access to administrative as well as judicial review under the Act.

The Fifth Circuit in the second panel consideration of *MacDonald Foundation, Inc.,* 554 F.2d 714 (5th Cir. 1977) sought to determine whether any jurisdictional grounds existed for entertaining a provider's claim against Health, Education and Welfare to compel the Secretary to pay over disallowed reimbursements. The Supreme Court had previously overturned the first *MacDonald Foundation, Inc.* panel decision that jurisdiction existed under the Administrative Procedure Act. *Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980 (1977). In concluding that Congress did not intend Section 405(h) to preclude federal-question jurisdiction over such claims as brought by MacDonald Foundation, Inc., the Fifth Circuit recognized the propriety of the *St. Louis University* Court's reasoning as it applied to constitutional claims against the Medicare Act of the type brought by St. Louis University. The Court stated:

And the Eighth Circuit, in *St. Louis University v. Blue Cross Hospital Service*, 537 F.2d 283 (8 Cir. 1976), a post-Salfi Medicare case, refused to find complete preclusion of federal question jurisdiction by §405(h), reasoning that constitutional claims must be reviewable despite §405(h) language to the contrary. With respect, we think the reasoning of our Brothers' careful opinion supports a more expansive result than they reached: (citing St. Louis University reasoning verbatim.) (554 F.2d at 717)

In an en banc decision, the Fifth Circuit in *MacDonald Foundation, Inc. v. Joseph A. Califano*, 571 F.2d 328 (1978) reversed the second panel's decision by concluding that §405(h) precluded federal-question jurisdiction to review decisions by the Secretary of Health, Education and Welfare awarding reimbursement under Medicare. In arriving at this end, the Court analyzed the preclusion of review issue while recognizing that the appellant was seeking to bring a constitutional claim as well as a claim for reimbursement. Though the provider was alleging a constitutional claim and had no procedure for judicial review under the Medicare Act, the Court still reached this conclusion:

> Assuming that when Congress incorporates sections specifically they intend to eschew the remainder, the conclusion is inescapable that Sec. 405(h) was intended to preclude all

> review. We therefore hold that §405(h), incorporated into Section 1395 (ii) of the Medicare Act, precludes all review of the Secretary's decisions by federal district courts brought under Section 1331. (571 F.2d at 331)

Not only did the Fifth Circuit reverse its second panel decision, but it appears to have rejected the reasoning in *St. Louis University, supra*. The Court summarized the Eighth Circuit's position as follows:

> The Eighth Circuit has held that although Section 405(h) precludes review of agency findings of fact and law, Section 405(h) does not preclude jurisdiction to entertain constitutional claims. *St. Louis University v. Blue Cross Hospital Service*, 537 F.2d 283 (8th Cir. 1976), cert. denied, 429 U.S. 977, 97 S.Ct. 484, 50 L.Ed.2d 584 (1977). (*MacDonald Foundation, Inc. v. Califano*, 571 F.2d at 331.)

As reflected in its own decision on the issue, the Fifth Circuit disagreed with the Eighth Circuit's position and presumably that Court's reasoning. While the Fifth Circuit's interpretation of Section 405(h) required that it then address MacDonald Foundation, Inc.'s claim that Section 405(h) unconstitutionally denies due process to claimants precluded from seeking review of constitutional claims, a caveat that the Court in *St. Louis University, supra*, had raised, the Court avoided this showdown by concluding that judicial review was

available elsewhere. The Court found that the Court of Claims had determined that it has jurisdiction to review claims arising under the Medicare Act. *White Cliff, Inc. v. United States,* 536 F.2d 347 (Ct.Cl. 1976), cert. denied, 430 U.S. 969, 97 S.Ct. 1652. While apparently recognizing that such jurisdiction was established on treacherous grounds, the Fifth Circuit stated that it was powerless to overturn such a determination by the Court of Claims. The Court then transferred the case to the Court of Claims, pursuant to 28 U.S.C. 1406(c).

Certainly, persistent arguments could have been made in an attempt to distinguish the factual circumstances of *St. Louis University, supra,* and *MacDonald Foundations, Inc., supra,* and even stronger arguments could have been made to distinguish the Unihealth matter from *MacDonald Foundation, Inc., supra.* The provider in *St. Louis University, supra,* was making a constitutional claim against the denial of a hearing and not primarily against a decision denying reimbursement. Since MacDonald Foundation, Inc.'s claim was directed to the reimbursement decision, that party was not in a strong position to argue that the claim did not arise under the Medicare Act.

Unihealth can present several factors arguably distinguishing its position from that of MacDonald Foundation, Inc. First, Unihealth is a non-provider and not a provider under the Medicare Act. Second, Unihealth has been adversely affected by a Medicare regulation and by other related administrative action without having access to any administrative remedies,

including a hearing, under the Medicare Act. Third, Unihealth has brought a claim primarily attacking the constitutionality of certain policy decisions, including the method of promulgation and application of these decisions. Though ultimate success in this lawsuit might result in Unihealth obtaining certain reimbursement funds withheld from providers serviced by Unihealth, this is not the primary thrust of plaintiff's claim.

The relevance of these distinctions is no longer open to question, however, since the Fifth Circuit has recently held, under factual circumstances similar to Unihealth, that the en banc decision in *MacDonald Foundation, Inc., supra,* and the decision in *Salfi, supra,* are controlling, and that Section 405(h) precludes federal-question jurisdiction over claims like those of Unihealth. *The American Association of Councils of Medical Staffs of Private Hospitals, Inc. (CMS), supra.*

In *CMS, supra,* an action was brought by an association of medical councils of private hospitals for declaratory and injunctive relief on behalf of its physician members who were challenging the constitutionality of certain federal regulations promulgated under the Medicare Act. These regulations required that larger provider hospitals establish utilization review committees, comprised of doctors on the staff of the hospital being reviewed. In the district court, the Department of Health, Education and Welfare moved for dismissal on grounds of lack of subject matter jurisdiction, based on the preclusion language of Section 405(h). CMS moved for summary judgment as to the

merits of the case. The trial court agreed with Health, Education and Welfare that Section 405(h) precluded federal-question jurisdiction but concluded that jurisdiction existed under the Administrative Procedure Act. *The American Association of Councils of Medical Staffs of Private Hospitals, Inc. v. Mathews,* 421 F.Supp. 848 (E.D. La. 1976). The Court then found in favor of Health, Education and Welfare on the merits.

On appeal, the Fifth Circuit first held that no jurisdiction existed under the Administrative Procedure Act, in the aftermath of *Califano v. Sanders, supra.* It then focused on whether federal-question jurisdiction was precluded by Section 405(h), as held by the district court.

At the outset, the Court acknowledged that conditions existed in the CMS matter that set it apart factually from other prior decisions considering Section 405(h) preclusion argument:

> The question of review of decisions apparently precluded by Section 1395(ii) [Section 405(h)] has been considered by several courts. The cases, however, have always been slightly different from this case. They have involved actions by providers complaining of reimbursement decisions and procedures. (575 F.2d at 1370)

Had the Court chosen to elaborate further on these distinctions, it would have acknowledged these particular differences between *CMS, supra,* and related jurisprudence: (1) as a nonprovider, CMS had been affected by a regulation specifically directed at providers; (2) CMS had no access to administrative or judicial procedures under the Medicare Act to challenge the constitutionality of the regulation. The Court found CMS' constitutional claim against a regulation having no effect on reimbursement to be the major distinction between *CMS, supra,* and *MacDonald Foundation, Inc.* (en banc), *supra.*

In spite of these fact differences, the Court held that *Salfi, supra,* and *MacDonald Foundation, Inc.* (en banc), *supra,* were controlling. The Court concluded:

> This court has decided that the Medicare Act withdraws jurisdiction from the district courts over actions like this one. (575 F.2d at 1372)

The Court saw no significance in the fact that CMS was a nonprovider, with no access to the administrative or judicial review procedures provided under the Medicare Act, who was bringing a constitutional claim against a Medicare regulation affecting it. Even after the Court recognized that the only available jurisdiction avenue with the Court of Claims was foreclosed since that Court cannot provide equitable or declaratory relief as sought in the suit, it did not alter its decision, nor did it adequately resolve the looming

constitutional questions directed at the Medicare Act. The Court did state that Congress has the power to deny all litigants against the United States any remedies and to restrict parties seeking to litigate certain constitutional claims to specified courts. After the consideration, the Court left it to the ingenuity of counsel for CMS either to bring the claims within the jurisdiction of the Court of Claims or to seek the guidance of a higher court.

This Court sees no means by which Unihealth can extricate itself from the broad holding in *CMS, supra.* The apparent aggregate effect of *Salfi, supra; MacDonald Foundation, Inc.* (en banc), *supra;* and *CMS, supra,* is total preclusion of federal-question jurisdiction for statutory and constitutional claims against the Medicare Act. Since this Court is bound by those decisions, it must conclude that Section 405(h), incorporated in the Medicare Act at 42 U.S.C. 1395(ii), prevents this Court from exercising federal-question jurisdiction over the claims of Unihealth.

In a final argument, Unihealth contends that jurisdiction is established under 28 U.S.C. 1343, since it has brought a claim pursuant to 42 U.S.C. 1985(3) urging that the Department of Health, Education and Welfare and others have entered a conspiracy to deprive the plaintiff of the equal protection of the law. This contention is short lived since plaintiff has not alleged and has failed to prove that there existed any racial or otherwise class-based discriminatory animus behind the alleged conspirators' actions. The Supreme Court

in *Griffin v. Breckenridge,* 403 U.S. 88, 91 S.Ct. 1799 (1971) has held that no relief can be obtained under 42 U.S.C. 1985(3) unless it is shown that racial or class-based discriminatory animus was an element of the conspiracy. Failing to state a viable claim under 42 U.S.C. 1985(3), Unihealth cannot utilize the statute's independent jurisdictional force to maintain the lawsuit in this Court.

While the preclusion reasoning in *CMS, supra,* applies to Unihealth, the results need not be so harsh as in *CMS, supra.* Though plaintiff seeks declaratory and injunctive relief in its complaint, it has also stated a claim for damages. A claim for damages can be entertained by the Court of Claims. While the total relief sought cannot be obtained, Unihealth can litigate its constitutional claims and obtain monetary damages should it prevail.

Accordingly, this Court reverses its earlier decision and DISMISSES the complaint of UniHealth Services Corporation pursuant to Federal Rule of Civil Procedure 12(b)(1).

New Orleans, Louisiana, this 7th day of February, 1979.

/s/ JACK M. GORDON
UNITED STATES DISTRICT
JUDGE

APPENDIX "D"

UNIHEALTH SERVICES CORPORATION

versus CA No. 77-3001

JOSEPH P. CALIFANO, in his official capacity
as Secretary of Health, Education & Welfare
of the United States, et al.

United States District Court
E.D. Louisiana

March 21, 1978

Plaintiff, a private professional management and consulting firm rendering service to nonprofit home health agency medicare providers, brought action against Secretary of Health, Education and Welfare on claim that standards applicable to franchisors, in determining reasonable rates, were improperly applied retroactively, in violation of its due process rights, to years when plaintiff operated as a management corporation as designated by Medicare. Defendant filed motion to dismiss. The District Court, Jack M. Gordon, J., held that: (1) because alleged regulations purportedly interfered with both contractual and occupational relationship of plaintiffs, plaintiff had standing to de-

mand that such regulation be conducted within due process parameters, and (2) court had federal question subject-matter jurisdiction over plaintiff's constitutional challenge to Medicare Act.

Motion to dismiss denied.

* * *

Donna D. Fraiche, Baton Rouge, La., for plaintiff.

Suzanne Cochran, Asst. Regional Atty., Dept. of Health, Education & Welfare, Dallas, Tex., for defendant.

MEMORANDUM AND ORDER

JACK M. GORDON, District Judge.

This matter is before the Court on the motion to dismiss of Joseph P. Califano, in his official capacity as Secretary of Health, Education & Welfare of the United States, et al (referred to as "the United States") brought pursuant to Federal Rules of Civil Procedure 12(b)(1) as a challenge to this Court having jurisdiction over the claims presented. The defendant's jurisdictional argument is grounded on two basic contentions:

(1) that the plaintiff lacks standing in this action so as to make it a case or controversy subject to a federal court's Article III jurisdiction under the United States Constitution; and

(2) that this Court does not have subject matter jurisdiction of the case in that §205(h) of the Social Security Act, incorporated into the Medicare provisions of the Act as 42 U.S.C. §1395 et seq., prevents this Court from exercising any judicial review over the particular claims presented by the plaintiff.

As best the Court can determine on the basis of the factual scenario presented in the record, Unihealth and the United States, through its appropriate agency which administers the Medicare program, agree on the following fact rendition. Plaintiff, Unihealth Services Corporation, established in 1969, is a private professional management and consulting firm specializing in the rendering of service to nonprofit home health agencies as those entitled are so defined in 42 U.S.C. §1395x(m). These agency clients are "providers" under Title 18 of the Medicare Act (referred to also as "Act"), 42 U.S.C. §1395 et seq. Plaintiff has contracted to provide services to certain providers but is not a Medicare provider itself.

Unihealth services 25 provider clients in a 17-state area and the District of Columbia pursuant to a contract with each client agency wherein a unified charge is billed for the services rendered based on the percentage of gross billings of the respective agencies as set out in the agreement. The cost, although not billed by means of a breakdown, purportedly included initial startup fees; professional consultation and orientation program; continued management services; manuals;

forms; brochures; other teaching tools; as well as guidance and aid in all financial matters; data processing; billing services and preparation of cost and periodic interim payment reports; and assistance in audit procedures conducted by fiscal intermediaries. In each contract with a provider, plaintiff has agreed that it will refund to the provider any charges for its services that are disallowed by Medicare. Plaintiff's clients receive monthly payments from Medicare which the client and the United States estimate will amount to the provider's proper reimbursement when costs are audited at the end of the fiscal year. Such interim payments include payments for the cost of the types of services provided by plaintiff.

From 1969 through 1976 Medicare officials recognized Unihealth as a management company under policy considerations set out under the provider reimbursement manual. Medicare in making its determination as to the reasonableness of cost regarding Unihealth's services to the providers scrutinized those costs under guidelines found appropriate to management companies. From 1970 until November, 1976, the fees Unihealth charged its clients were found to be within the principles of reimbursement and thus allowed.

As alleged by plaintiff, in 1968 [sic] officials of Medicare began to review the status of the plaintiff in an effort to make a policy determination as to whether Unihealth should be regarded as a management company

or as a franchisor under the provider reimbursement manual. Plaintiff claims that such a review was made without the knowledge of Unihealth. Purportedly without receiving legal notice of any meetings, officials of Medicare met and reached a policy decision that Unihealth should be treated as a franchisor when Medicare makes a determination on reimbursement. Under §2133 of the Provider Reimbursement Manual, franchise fees are allowable only to the extent that they are not out of line with costs of similar services provided by nonfranchise organizations. This section requires that providers establish the cost of each of the specific services provided by the franchisor. It requires exclusion of any additional fees relating to the franchisor's trademark or reputation which are purportedly not related to patient care.

As a result of this policy determination recognizing Unihealth as a franchisor, the plaintiff contends that those standards applicable to franchisors in determining reasonable costs, were applied retroactively to those years when plaintiff was operating as a management corporation as designated by Medicare. Retroactive application of standards relating to franchisors purportedly altered the condition under which plaintiff was operating in the following manner:

(1) That Medicare officials retroactively conducted a more rigorous scrutiny of Unihealth's cost report than was required when Unihealth was accorded management status;

(2) That Unihealth was required to provide itemized cost statements of each individual service rendered to a provider whereas in the past under standards applicable to management corporations, it did not have to itemize costs as to individual services;

(3) That under the franchisor standards, and as referred to above, Unihealth was forced to retroactively utilize more onerous accounting procedures in setting out the costs of the services rendered;

(4) That the presumption that all costs and services stated by a management corporation are reasonable was substituted for the franchisor presumption that all costs and services rendered are not reasonable and must be proven by detailed documentation.

Plaintiff contends that as a result of this retroactively applied policy determination recognizing it as a franchisor, Unihealth's provider clients have withheld almost all payments outstanding to Unihealth in the full amount of $800,000.

In an effort to challenge the legality of the policy determination, the method of promulgating that determination, and the manner in which the policy decision and its attendant requirements were applied, Unihealth filed the lawsuit temporarily allotted to Section "I" after its transfer from Section "C." The following is

a summary of the numerous claims for relief set out in plaintiff's complaint.

(1) That defendant has infringed its due process rights as set out in the Fifth Amendment of the United States Constitution: (a) by singling out the plaintiff in an attempt to regulate it under the Medicare Act without allowing plaintiff any administrative review or judicial review as provided by the Medicare Act; (b) by failing to give plaintiff guidelines further defining "reasonable cost" pursuant to Title 20, Code of Federal Regulations, §405.501, et seq.; (c) by failing to give the plaintiff proper or legal notice that its charges for services would be disallowed based on retroactively applied policy decisions affecting cost reports for the years 1976, 1975 and 1974; (d) by retroactively applying the policies, practices, actions, and determinations of defendant so as to force plaintiff out of its professional practice thereby proscribing its ability to engage in its profession; (e) by denying plaintiff the right to a hearing relative to the issue of its status as a franchisor, though defendant's precedential policy determination had the adverse effect of depriving Unihealth of its presumption of having submitted reasonable costs on a unified basis;

(2) That defendant has failed to grant equal protection under the law to plaintiff as required by the Fifth Amendment of the United States Constitution when it singled out plaintiff on the basis of its unique status in the Medicare field to demonstrate that disallowances of certain charges submitted to Medicare could be made on a retroactive basis.

The parties are in substantial disagreement as to what is the nature of the relief sought. The United States suggests that the only relief that plaintiff is truly seeking is to have judicial review of an administrative determination under the Medicare Act that the costs of services charged to providers by Unihealth were unreasonable. On the basis of this characterization of the relief Unihealth allegedly is seeking, the United States suggests that this Court should adopt the reasoning set forth in *New Jersey Chapter, Incorporated, of the American Physical Therapy Association, Inc. v. The Prudential Life Insurance Company of America*, 164 U.S.App.D.C. 40, 502 F.2d 500 (1974), wherein the Court discussed both the standing and judicial review issues. In that case, the Association of Physical Therapists as a contractor of services to providers brought an action against its fiscal intermediary (private company chosen by United States to make initial determination of reasonableness of costs that providers have sustained) under the Medicare program challenging guidelines adopted by the intermediary for reimbursement to providers for cost of physical therapists' services. Medicare officials made

a policy determination clarifying what intermediaries should determine to be reasonable costs for physical therapy services. In adopting these new policy considerations the officials stated that it would be necessary that accurate records of the therapists' activities be maintained and made available to the intermediary. Then, the officials prospectively applied these new record-keeping requirements to providers in the program.

In entertaining the nonconstitutional challenge to the guidelines adopted by the intermediaries, the Court applied the following analysis to the issues:

> On this appeal the government argues (1) plaintiff's complaint does not state a meritorious claim for relief; (2) the District Court correctly held that plaintiff did not have standing to sue; and (3) determination of the amounts payable to providers of services is not subject to judicial review. We turn first to the government's second and third arguments.

The government says correctly that the Act was expressly designed for the protection of elderly citizens who require medical care, and those persons of course have standing to vindicate their rights under the Act. Furthermore, since the Act assures a provider of reimbursement for the reasonable costs incurred by him, a provider would seem to have an interest within the zone protected by the

statute. Plaintiff's members on the other hand are not subject to regulation under the Act and their rights are derived from their contractual arrangements with providers. There is nothing in the Medicare Act or its legislative history, says the government, which indicates any concern by Congress to protect the interests of persons such as plaintiff's members who are only indirectly affected by the operation of the Medicare program. From all this the government concludes that the plaintiff and its members have no standing to sue.

In support of its argument the plaintiff's claims are not subject to judicial review the government directs our attention to the provisions of the Medicare Act, 42 U.S.C. §1395ff, which provide for judicial review of (1) a determination of whether an individual is entitled to benefits, and (2) a determination that an institution is not a provider of services or that its agreement to provide services should be terminated. The government finds it significant that no provision is made for judicial review of the award of compensation to providers of services; and the government reasons that since decisions on this matter are not subject to judicial review it follows *a fortiori* that decisions on the amounts due to contractors, who are indirectly affected by the Medicare program, are also not subject to judicial review.

There is much force in the government's arguments. As this court has said however recent decisions of the Supreme Court "have made the standing obstacle to judicial review a shadow of its former self, and have for all practical purposes deprived it of meaningful vitality." *National Automatic Laundry & Cleaning Council v. Shultz,* 143 U.S. App. D.C. 274, 278, 443 F.2d 689, 693 (1971). Standing need not be founded on a rock; a pebble or even a cobweb may do. Moreover, only a showing of clear and convincing evidence of legislative intent will justify a court in precluding access to judicial review. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Barlow v. Collins,* 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d. 192 (1970). Here, we think plaintiff's standing and the reviewability of plaintiff's claims at least present close and difficult questions; but we shall not pause to wrestle with these problems, since we conclude that in any event the defendants must prevail on the merits. (164 U.S. App. D.C. at 44, 502 F.2d at 504).

Unihealth denies that it has brought this action in an attempt to obtain judicial review of an administrative determination that Unihealth's charges to a provider were unreasonable. Rather, Unihealth suggests that it is raising constitutional challenges stemming from the Government's stringent regulation of the plaintiff's

contractual relationship with the providers. In particular, Unihealth avers that its due process rights have been violated in that Medicare officials denied it access to the administrative and judicial review established in the Medicare Act while at the same time stringently regulating the plaintiff through enactment of policy determinations made pursuant to the Medicare Act. In a second constitutionally based allegation, Unihealth contends that its due process rights have been denied in that the policy determinations effecting strict regulation of the plaintiff are unconstitutional on their face, in the manner of application, and in their method of promulgation.

Unihealth urges that it has a right to bring these constitutional challenges stemming from indirect regulation by the Medicare Act, citing *Cotovsky-Kaplan Physical Therapists Association, Ltd. v. United States,* 507 F.2d 1363 (7th Cir. 1975). In *Cotovsky, supra,* the issue before the Court was whether a supplier of services, whose own interests were not directly regulated by statute or administrative action under the Medicare Act, had standing to challenge a regulation which required its regulated customers to take their patronage elsewhere. The regulation in question provided that providers could contract out the provision of physical therapy services only to nonprofit therapy agencies and not to proprietary corporations such as the plaintiffs. Plaintiffs brought suit alleging that such a regulation deprived them of property without due process of law. The District Court concluded that plaintiffs lacked standing to challenge the constitutionality of the regulation.

The Appellate Court, in reversing the decision of the District Court, concluded that the interests sought to be protected by the physical therapists were arguably within the zone of interest to be protected or regulated by the Medicare statute or by the constitutional guarantee of the Fifth Amendment. The Court reasoned as follows:

> Defendants respond and the district court concluded, however, that the regulation purports to regulate only home health agencies and that it does not regulate plaintiffs or their contracts. To focus on whether the plaintiffs are directly regulated themselves is to read the Data Processing test too narrowly. The test is not whether these plaintiffs are regulated by the statute but whether the interests asserted by them arguably fall within the zone of interests so regulated.

Nearly three decades before its Data Processing decision, the Supreme Court held that indirect regulation, like that involved in this case, was adequate to confer standing to challenge administrative action. In *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563, the Court held that CBS had standing to challenge F.C.C. regulations conditioning the grant of broadcast licenses to local stations on the nature of their contracts with radio networks. Neither CBS nor its contractual rela-

tionship with any local station was directly regulated. Nevertheless, in response to a standing argument similar to that made here, the Court held:

> Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that, by setting the controlling standards for the Commission's action, *the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners* whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked. 316 U.S. at 422, 62 S.Ct. at 1202-1203 (emphasis added.)

Even more directly in point is the holding in *Air Reduction Co., Inc. v. Hickel*, 137 U.S. App. D.C. 24, 420 F.2d 592 (1969). In that case private producers and distributors of helium challenged regulations of the Secretary of the Interior providing that government contractors must purchase all of their helium requirements for those contracts from the government. The regulations, of course, did not directly regulate the plaintiffs or their contracts with government contractors. Nevertheless, the court of appeals held that they had standing.

We therefore conclude that if, pursuant to what it perceives to be its statutory authority, a government agency regulates the contractual relationships between a regulated party and an unregulated party, the latter as well as the former may have interests that are arguably within the regulated zone for purposes of testing standing, and for this purpose a total prohibition is a form of regulation.

As the interests of these plaintiffs arguably fall within the zone regulated by the Medicare statutes, we hold that they have standing to obtain judicial review of 20 C.F.R. §405.1221(a). (507 F.2d at 1366-1367).

The Court also recognized that it was not necessary to decide whether plaintiffs had standing on constitutional grounds because their interests arguably fell within the zone of interest protected by the Fifth Amendment. The Court so opined:

> . . . "when the plaintiff is challenging governmental action on constitutional grounds, he necessarily is asserting that his interest is protected by the constitutional guarantee upon which he is relying." . . . (507 P.2d at 1368, n. 12)

The Court agrees with Unihealth that it has raised more than a request for a review of its charges to providers. Just as plaintiff has characterized its claims, Unihealth is demanding both that it be allowed access to the review procedures provided by the Medicare Act

and that it be regulated within due process parameters since the alleged regulations have purportedly interfered with both contractual and occupational relationships of plaintiff.

In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) the Court held that a party possesses standing to seek nonstatutory judicial review of administrative action if it "alleges that the challenged action has caused it injury in fact, economic or otherwise," and if "the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question."

First, it is evident that the alleged challenged actions, i.e., no access to administrative and judicial review under the Medicare Act and the unconstitutionality of the regulations imposed on plaintiff, have caused the plaintiff economic harm and otherwise in affecting its relationships with the providers such that providers are withholding certain sums purportedly owed Unihealth.

Second, as stated in *Cotovsky, supra*, the Court is to assume that plaintiff arguably falls within the zone of interest protected by its Fifth Amendment rights when it challenges governmental action on Fifth Amendment grounds.

Whether or not Unihealth arguably falls within the zone of interest regulated by the Medicare Act turns on a determination of the nature and extent of alleged regulating activities. *Cotovsky, supra.* Since a factual issue remains regarding the nature and extent that Unihealth has been regulated, the Court must resolve this issue on the merits before it can render a decision on standing under the Medicare Act. Courts have recognized that they may postpone a decision on a jurisdictional issue if that issue is intertwined with a decision on the merits of the case. *Continental Casualty Company v. Department of Highways, State of Louisiana,* 379 F.2d 673 (5th Cir. 1967). Therefore, while the Court has already concluded that this plaintiff has standing under the Fifth Amendment to bring the claims, it will await a decision on the merits before deciding whether Unihealth also has standing under the Medicare Act.

Having concluded that standing does exist, at least under the constitutional grounds for plaintiff to bring this action, the Court turns its inquiry to the issue of whether it has subject matter jurisdiction to review such claims.

Basically, plaintiff is asserting that the Court has federal question jurisdiction pursuant to 28 U.S.C. §1331. The defendant's challenge to this jurisdictional approach is grounded on statutory language in the Medicare Act. In 42 U.S.C. §405(g), Congress has set forth the administrative and judicial review provisions for entertaining official administrative determinations. The statute provides:

(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with

any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

The pertinent section of the Medicare Act pertaining to the restriction of judicial review under federal-

question jurisdiction is found in 42 U.S.C. §405(h) which provides as follows:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under §24 of the Judicial Code of the United States (28 U.S.C. §1331) to recover on any claim arising under this title.

Until the United States Supreme Court's decision in *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), the lower courts had read §405(h) as merely codifying the principle of exhaustion of administrative remedies. The Supreme Court considered this reading of the section to be entirely too narrow. In *Salfi, supra*, a class action was filed by a widow and a stepchild seeking social security benefits after the death of the widow's wage-earning spouse. The Administration denied payment of any benefits on the basis of a regulation that requires the wife or child to have had such a relationship with the deceased wage-earner for at least nine months prior to the wage-earner's death before benefits can be paid. Without seeking administrative review of the decision, the wife filed suit in federal district court attacking the constitutionality of the above regulation.

The Supreme Court concluded that §405(h) of the Medicare Act prevented the plaintiff in that case from seeking judicial review of the administrative determination pursuant to 28 U.S.C. §1331. The Court concluded that she had an alternate judicial remedy as provided in §405(g) to appeal the Secretary's finding to the federal district court. There were several crucial determinations made by the Court in reaching its decision that the plaintiff could not pursue her claim under federal question jurisdiction. First, the Court recognized that plaintiff as an alleged beneficiary under the Social Security Act did indeed come within the scope of the Act. Second, the Court concluded that the plaintiff's claim for social security benefits, consistent with the design of §405(h) arose under the Social Security Act. Though the plaintiff had characterized her claim as a constitutional attack on a regulation promulgated under the Act, the Court concluded that she was suing under the Act since she sought benefits provided by the Act, had standing under the Act, and a substantive basis for the presentation of her constitutional claims arose from the Act. Though the Court foreclosed federal question jurisdiction as a means of obtaining judicial review of her constitutional challenge, the Court was mindful of the grave constitutional problems created when legislation is so interpreted as to totally preclude judicial consideration of constitutional issues. The impact of such preclusion was not addressed since the Court recognized that §405(g) provided an alternative for judicial review of constitutional challenges to regulations promulgated under the Act. The Court so stated:

> The Social Security Act itself provides jurisdiction for constitutional challenges to its provisions. Thus the plain words of the third sentence of §405(h) do not preclude constitutional challenges. They simply require that they be brought under jurisdictional grounds contained in the Act, and thus in conformity with the same standards which are applicable to nonconstitutional claims arising under the Act. The result is not only of unquestionable constitutionality, but is also manifestly reasonable, since it assures the Secretary the opportunity prior to the constitutional litigation to ascertain, for example, that the particular claims involved are neither invalid for other reasons nor allowable under other provisions of the Social Security Act. (95 S.Ct. at 2465)

In the aftermath of the *Salfi* decision, while attempting to apply the preclusion rule of §405(h), the lower courts have struggled to clarify certain puzzling questions raised by *Salfi, supra*. Those frequently asked questions are: (1) when should a claim be deemed as being brought pursuant to the Medicare Act; (2) does §405(h) preclude judicial review under federal question jurisdiction of nonconstitutional claims where no alternative judicial review is provided by the Medicare Act; and (3) does §405(h) preclude judicial review of constitutional challenges to the Act where no review procedure for such challenges is provided in the Act?

In *Hazelwood Chronic and Convalescent Hospital, Inc. v. Weinberger*, 543 F.2d 703 (9th Cir. 1976) the Court concluded that the directive in *Salfi, supra*, prevented resort to federal-question jurisdiction on a constitutional challenge to denial of benefits under the Social Security Act. However, aware that a constitutional challenge requires a forum where it may be redressed, the Court held that the Administrative Procedure Act provided an implicit but independent basis for jurisdiction. 5 U.S.C. §702, et seq.

Shortly after the *Hazelwood* decision, the Supreme Court in *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1976) concluded that the Administrative Procedure Act did not afford an independent grant of such jurisdiction to a party seeking to have judicial review of an administrative decision disallowing social security claims. The Court did emphasize that the caveat raised in *Salfi, supra*, and *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) regarding the need to provide judicial review for constitutional challenges was still of vital significance. The Court concluded that the respondent Sanders did have a forum for judicial review as provided under §405(g) of the Social Security Act.

In *South Windsor Convalescent Home, Inc. v. Mathews*, 541 F.2d 910 (2d Cir. 1976), the Second Circuit in a post-*Salfi* decision concluded that §405(h) prevented the plaintiff from seeking jurisdictional review under 28 U.S.C. §1331 of his claim that a regulation under Medicare retroactively disallowed certain payments

owed him as a provider, thereby violating his Fifth Amendment rights. The Court did find that an alternative jurisdictional basis existed under 28 U.S.C. §1491 when a claim against the United States exceeds the sum of $10,000. As stated in 28 U.S.C. §1491:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress, or any regulation of an executive department. . . .

As done by other courts considering these Medicare issues, the *South Windsor* court considered what the repercussions would be should Congress through its legislation close the federal courts entirely to constitutional challenges directed against federal statutes or actions. The Court opined:

> However, when *Salvi's* conclusion is appl[y] to a case where no alternative jurisdictional basis exists, its restrictive interpretation of §1331 might lead to a constitutional question of the first order, one that has arisen but rarely and tangentially in our constitutional history, i.e., whether the Congress can close the federal courts entirely to constitutional challenges directed against federal statutes or actions. We doubt that the Supreme Court intended its reading of §405(h) in *Salfi* to have the effect of precluding federal jurisdiction over con-

> stitutional questions, since the result would be at odds with the well-established principle that a court will not construe a statute to restrict access to judicial review unless Congress manifests its intent to do so by "clear and convincing evidence."

The Fifth Circuit in *Dr. John T. MacDonald Foundation, Inc. v. Mathews,* 554 F.2d 714 (5th Cir. 1977) disagreed with the Second Circuit's conclusion that §405(h) did not preclude jurisdiction under 28 U.S.C. §1491. The Fifth Circuit stated:

> . . . In *South Windsor Convalescent Home, Inc. v. Mathews,* 541 F.2d 910 (2d Cir. 1976), the Second Circuit concluded that *Salfi* precluded federal-question jurisdiction in Medicare cases like this one but found jurisdiction to review existed in the Court of Claims. This it did on reasoning that although the last sentence of §405(h) forbade review under "section 41 of Title 28," it did not speak to 28 U.S.C. §1491, the Court of Claims provision. This analysis fails, however, to deal with what seems to us the equally preclusive language of the second sentence of §405(h): "No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal or governmental agency except as herein provided." (554 F.2d at 716-717)

In proscribing the alternate jurisdictional bases to §405(g) under 28 U.S.C. §1331, 28 U.S.C. §1491, and 5 U.S.C. §702, the courts have quickly approached that situation that they found necessary to avoid in their interpretation of §405(h), that being the conclusion that Congress by enactment of this section had closed the federal courts entirely to constitutional challenges directed against the Medicare Act.

In *Gallo v. Mathews,* 538 F.2d 1148 (5th Cir. 1976), the Fifth Circuit came disturbingly close under the factual circumstances before it to interpreting §405(h) of the Medicare Act so as to preclude all judicial review to a party. At the time of the decision, the Supreme Court had not yet closed the door on an alternative jurisdiction basis under the Administrative Procedure Act. In the *Gallo* matter, Dr. Gallo as a provider was seeking to have the federal district court compel the Secretary of Health, Education and Welfare to pay certain reimbursements that the Secretary had earlier disallowed.

Gallo was challenging reimbursement decisions made on services rendered in the years 1966 through 1971. Prior to 1973, the Medicare Act had not adopted §405(g) of the Social Security Act, so that the Medicare Act precluded any judicial review of those reimbursement decisions complained of by plaintiff. After concluding that the Medicare Act afforded plaintiff no judicial review procedures, the Court also agreed that the *Salfi* court had interpreted §405(h) so as to prevent Gallo from seeking judicial review of the administrative decisions under 28 U.S.C. §1331. In discussing

why *Salfi, supra,* was applicable in a situation where the plaintiff had no forum for review under §405(g), the Court stated:

> The determination in that case [*Salfi*] did not rest on the availability of judicial review through 405(g), but rather was based on the clear language of 405(h). That same language applies to the present case, and we find it controlling so as to preclude jurisdiction under 1331. (538 F.2d at 1150)

The Court did not have to consider the caveat raised in *Salfi, supra,* concerning preclusion of all constitutional challenges to statutory limitations though it did emphasize the gravity of that caveat. The Court stated:

> As noted in *Salfi,* any interpretation of §405(h) which precludes all constitutional challenges to statutory limitations would raise a serious constitutional question of the validity of the statute as so construed, 422 U.S. at 762, 95 S.Ct. 2457. *Gallo* points out that this consideration should lead us to the conclusion that *Salfi* does not apply. But this is an issue we need not reach, for we agree with *Gallo* that jurisdiction exists under the provisions of the Administrative Procedure Act. (538 F.2d at 1150)

It is clear that in reaching this decision, the Fifth Circuit concluded, adhering to *Salfi, supra,* and *Califano,*

supra, that plaintiff provider had access to any administrative remedies available under the Act and that the provider was bringing his claim under the Act.

The Eighth Circuit in *St. Louis Univ. v. Blue Cross Hosp.,* 537 F.2d 283 (8th Cir. 1976) has carefully scrutinized those ambiguous areas left by *Salfi, supra.* St. Louis University as a representative of a provider brought an action pursuant to 28 U.S.C. §1331 challenging the constitutionality under the due process clause of certain regulatory procedures used. Allegedly, the Secretary of Health, Education and Welfare used a provider appeals committee, a majority of the members of which were officers or employees of the very agency whose initial decision was being appealed, and who had an institutional interest in the outcome.

Health, Education and Welfare took the position that judicial review of the due process claim was barred by §405(h) and administrative review was precluded by an agreement between Health, Education and Welfare and Blue Cross which established the provider appeals committee. Health, Education and Welfare stated that it would not review the appeal committee's decision even when a provider asserted that the committee had blatantly ignored governing statutes, regulations, and constitutional requirements. The Eighth Circuit agreed with the district court's conclusion that St. Louis University could bring a due process claim challenging certain procedures of the Medicare Act under

federal-question jurisdiction. In doing so, the Court provided an in-depth analysis of why the *Salfi* decision was not controlling in situations where a party has no other jurisdictional basis for bringing a due process claim than under 28 U.S.C. §1331.

> The Supreme Court has recognized that totally precluding judicial consideration of constitutional issues raises serious constitutional problems. *Weinberger v. Salfi, supra,* 422 U.S. at 762, 95 S.Ct. at 2465, 45 L.Ed.2d at 537; *Johnson v. Robinson,* 415 U.S. 361, 366 & n. 8, 94 S.Ct. 1160, 1165, 39 L.Ed.2d 389, 397 (1974). Those constitutional problems are greatly intensified when an agency purports to subdelegate its immunity from judicial review to a nongovernmental entity. It is a "cardinal principle" that we are to ascertain whether a construction of the statute involved is "fairly possible" by which such constitutional doubts may be avoided. *Johnson v. Robinson, supra,* 415 U.S. at 366-67, 94 S.Ct. at 1165-1166, 39 L.Ed.2d at 397-398. We are to proceed in what Justice Stewart termed "the candid service of avoiding a serious constitutional doubt." *United States v. Vuitch,* 402 U.S. 62, 97, 91 S.Ct. 1294, 1312, 28 L.Ed.2d 601, 624 (1971) (Stewart, J., dissenting in part).

Thus, we must now return to §405(h) to determine if it precludes our jurisdiction to entertain a due process challenge to the pro-

cedures adopted by the Secretary to determine Medicare reimbursements. Section 405(h) forbids any action under §1331 "to recover on any claim arising under this subchapter." Appellees in *Salfi* argued that this did not bar their constitutional claims since they "arose under" the Constitution and not under the Social Security Act. The Supreme Court recognized that this argument had substance. 422 U.S. at 760, 95 S.Ct. at 2464, 45 L.Ed.2d at 536. However, it rejected the argument because not only is it Social Security benefits which appellees seek to recover, but it is the Social Security Act which provides both the standing and the substantive basis for the presentation of their constitutional contentions. [Id. at 760-61, S.Ct. at 2464, 45 L.Ed.2d at 536.]

The Court also indicated that its decision was influenced by the availability of fully adequate judicial review under §405(g). The Court said:

> In the present case * * * the Social Security Act itself provides jurisdiction for constitutional challenges to its provisions. *Thus* the plain words of the third sentence of §405(h) do not preclude constitutional challenges. [Id. at 762, 95 S.Ct. at 2465, 45 L.Ed.2d at 537 (emphasis added).]

In the present case, the due process claim has as its primary goal obtaining a constitutionally adequate hearing. Allowing such a hearing will not necessarily affect the University's entitlement to reimbursement or the amount allowed. Secondly, and more importantly, the Medicare Act does not provide the University an adequate alternative means of obtaining judicial review of its due process claim.

We believe that on these two grounds alone, this case is distinguishable from *Salfi*, and thus §405(h) does not preclude our jurisdiction of count II. However, there is a third basis for distinction. Section 405(h) is incorporated into the Medicare Act only "as * * * applicable." §1395ii. The general rule is that a statute incorporated into another "as applicable" will be read in such a manner as will give form and effect to the statute into which it is incorporated. *Penrose v. Whitacre*, 62 Nev. 239, 147 P.2d 887, 889 (1944), and authority cited therein. If §405(h) were read to wholly preclude adjudication of the University's due process claim it would raise serious constitutional problems which might impair the force and effect of the Medicare Act. Therefore, we find that Congress did not intend for §405(h) to apply to the Medicare Act in such a manner as to completely bar judicial consideration of a claim of denial of due process. (537 F.2d at 291, 292.)

In essence, the Court concluded that the constitutional claim did not arise under the Medicare Act as required in §405(h) since the claim had as its primary goal obtaining a constitutionally adequate hearing rather than the determination of an entitlement to reimbursement. Second, the Court concluded that constitutional challenges against the Medicare Act must be reviewed in Federal Court pursuant to federal-question jurisdiction where the Medicare Act fails to provide an adequate judicial review remedy.

In *Dr. John T. MacDonald Foundation, Inc. v. Mathews*, 534 F.2d 633 (5th Cir. 1977), the Fifth Circuit in a matter similar factually to the *Gallo* case, *supra*, recognized that §405(h) barred §1331 jurisdiction over a challenge to a reimbursement decision by the administrative officials, even though such reimbursement decisions made prior to 1973 were not judicially reviewable under the Medicare Act. The Court did conclude, however, that plaintiff had an alternate jurisdictional avenue for obtaining judicial review under the Administrative Procedure Act.

After the Supreme Court in *Califano v. Sanders* precluded the use of the Administrative Procedure Act as an alternate means of obtaining jurisdiction, the Fifth Circuit granted a rehearing in *MacDonald Foundation*, 554 F.2d 714 (5th Cir. 1977). The Court sought to determine whether any available jurisdictional grounds existed through which the plaintiff could bring its claim to compel the Secretary to pay over disallowed reimbursements. As support for its conclusion that Con-

gress did not intend §405(h) to preclude federal-question jurisdiction over such claims as brought by plaintiff (where no judicial review was provided for in the Medicare Act), the Court adopted a substantial part of the reasoning set forth in *St. Louis University v. Blue Cross Hospital Service, supra.* Of crucial impact to this Court's inquiry was the fact that the Fifth Circuit explicitly agreed in toto with the *St. Louis University* court's reasoning as it applied to the type of constitutional claim brought in the *St. Louis University* matter. The Court stated:

> And the Eighth Circuit, in *St. Louis University v. Blue Cross Hospital Service,* 537 F.2d 283 (8 Cir. 1976), a post-*Salfi* Medicare case, refused to find complete preclusion of federal question jurisdiction by §405(h), reasoning that constitutional claims must be reviewable despite §405(h) language to the contrary. With respect, we think the reasoning of our Brothers' careful opinion supports a more expansive result than they reached: [citing *St. Louis University* reasoning verbatim.] (554 F.2d at 717)

The Fifth Circuit, in adopting parts of the reasoning in the *St. Louis University* decision held as follows:

> We agree that *Salfi,* a Social Security Act case, is distinguishable from and does not rule Medicare appeals. We also agree that §405(h) incorporated into the Medicare context, should be there read in such a manner as to give rational form and effect to the workings of the Medicare scheme. We therefore hold that during the period before it provided adequate statutory review within the Medicare Act, and during that period only, Congress did not intend §405(h) to preclude federal-question jurisdiction over such matters as this. (554 F.2d at 717-18)

As made clear in the decision, the Fifth Circuit found that the challenges raised by plaintiff arose under the Medicare Act. Yet after recognizing that the Medicare Act provided no procedure for judicial review of challenges to administrative disallowances of reimbursements, the Court found it necessary to conclude that federal-question jurisdiction was an acceptable jurisdictional basis under the circumstances.

Regardless of how each court has applied §405(h) of the Medicare Act, they have all emphasized one caveat — the Medicare Act cannot be interpreted as closing the federal courts to the presentation of a constitutional challenge to the Act itself. Additionally, these courts have agreed that the constitutional challenge to the Act must be brought *under the Medicare Act* before §405(g) and (h) can be applied to such claim. *Salfi, supra.* Where the Court in *St. Louis Univ. v. Blue Cross Hosp. Serv., supra,* found (1) that a constitutional challenge against the Act was not brought under the Act and (2) that the Act itself did not provide a right for judicial redress of that claim, then even a provider under the Act

would be allowed to pursue a claim under 28 U.S.C. §1331 jurisdiction in spite of the implications raised in *Salfi, supra.*

The Fifth Circuit has recognized the rectitude of the decision in the *St. Louis University* case. In its latest decision involving the application of §405(h) of the Medicare Act, the Fifth Circuit has held that even a provider under the Act who brings a claim for reimbursement under the Medicare Act can assert jurisdiction under 28 U.S.C. §1331, where the Act fails to provide a procedure for judicial review.

The plaintiff in the present case is admittedly not regulated as a provider. The brunt of Unihealth's claim is, however, that it is being regulated by the Medicare Act while at the same time being denied due process rights regarding the manner in which it is being regulated. Specifically, Unihealth contends that it is being denied access to the administrative and judicial review procedures provided in the Act, while being regulated by a policy determination promulgated without legal notice and applied retroactively. All of these actions are purportedly in violation of Unihealth's due process rights.

The analysis in *St. Louis University v. Blue Cross Services, supra,* where that Court concluded that the *Salfi* decision did not prevent the provider from asserting 28 U.S.C. §1331 jurisdiction, is directly applicable to Unihealth in the present matter. In the *St. Louis University*

decision, the Court held: (1) that the due process challenge to certain regulations under the Medicare Act were not made under the Medicare Act; (2) that the Medicare Act provided for no judicial review of the party's claim; and (3) that reading §405(h) to wholly preclude the adjudication of the party's due process claim would raise serious constitutional problems concerning the Medicare Act. These three factors are certainly relevant here.

Initially, Unihealth has brought a claim, similar to the one asserted by St. Louis University, seeking as its primary objective the redress of its due process rights rather than the obtainment of funds derived from Medicare. This fact alone supports the conclusion that Unihealth's claims are not brought under the Medicare Act. *St. Louis University, supra.* Such a conclusion is reinforced when the Court considers that the United States has made a persistent stand denying this nonprovider any access to the Medicare Act. The Court cannot reconcile the inconsistencies in the United States' position where it contends that Unihealth, though unable to avail itself of any of the administrative and judicial remedies provided under the Act, is still bringing its claims under the same Act.

Second, Unihealth not only has no judicial review procedure under the Act in which to bring its constitutional claims, but also has been denied any access to purely administrative remedies under the Act as well. This Court again fails to see any logic in the United States' position denying Unihealth access to any of the

administrative and judicial review procedures under the Act, while at the same time arguing that one particular preclusion provision under the Act [§405(h)] is indeed applicable to Unihealth in barring jurisdiction under 28 U.S.C. §1331.

Third, those same serious constitutional problems considered by the Court in the *St. Louis University* decision loom equally large in this matter should the Court read §405(h) as to wholly preclude adjudication of due process claims against the Medicare Act.

Based on reasoning in no way inconsistent with the Supreme Court's pronouncements in *Salfi, supra,* and *Califano, supra,* this Court must now conclude that Unihealth Services Corporation has jurisdiction pursuant to 28 U.S.C. §1331 to bring its constitutional claims.

Accordingly, on the basis of the foregoing reasons this Court first concludes that Unihealth Services Corporation has standing under the Fifth Amendment to the United States Constitution to assert its constitutional challenges. A decision as to whether Unihealth has standing under the Medicare Act will be postponed until this Court makes a decision on the merits regarding the nature and extent that Unihealth has purportedly been regulated by the Act. Second, this Court also concludes that Unihealth has subject-matter jurisdiction pursuant to 28 U.S.C. §1331 to have the constitutional challenges to the Medicare Act reviewed by this Court. The motion of the United

States to dismiss the claim brought by Unihealth Services Corporation is hereby DENIED.

APPENDIX "E"

§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the Following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * * *

§1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and ex-

clusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, §1, 72 Stat. 415.

* * * *

§1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. June 25, 1948, c. 646, 62 Stat. 931; May 24, 1949, c. 139, §79, 63 Stat. 101.

* * * *

TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE—Continued

CHAPTER 85—DISTRICT COURTS; JURISDICTION—Continued

§1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

[See main volume for text of (b) to (d)]

* * * *

§1346. United States as defendant

* * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and

after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * *

§1361. Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

* * * *

§1491. Claims against United States generally; actions involving Tennessee Valley Authority

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or

Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority.

As amended Nov. 1, 1978, Pub.L. 95-563, §14(i), 92 Stat. 2391.

* * * *

§2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of

the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, §111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, §12(p), 72 Stat. 349.

* * * *

42 §405 PUBLIC HEALTH AND WELFARE

* * * *

Judicial review

(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision com-

plained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same

manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

Finality of Secretary's decision

(h) The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

* * * *

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§1395ii. Application of certain provisions of subchapter II.

The provisions of sections 406 and 416(j) of this title, and of subsections (a), (d), (e), (f), (h), (i), (j), (k), and (*l*) of section 405 of this title, shall also apply with respect to this subchapter to the same extent as they are applicable with respect to subchapter II of this chapter.

Aug. 14, 1935, c. 513, Title XVIII, §1872, as added July 30, 1965, Pub.L. 89-97, Title I, §102(a), 79 Stat. 332, and amended Oct. 30, 1972, Pub.L. 92-603, Title II, §242(a), 86 Stat. 1419.

* * * *

* * * *

Post-hospital home health services

(n) The term "post-hospital home health services" means home health services furnished an individual within one year after his most recent discharge from a hospital of which he was an inpatient for not less than 3 consecutive days or (if later) within one year after his most recent discharge from a skilled nursing facility of which he was an inpatient entitled to payment under part A for post-hospital extended care services, but only if the plan covering the home health services (as described in subsection (m) of this section) is established within 14 days after his discharge from such hospital or skilled nursing facility.

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§1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in

the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class or persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the

premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. §1980.

* * * *

PART V. JURISDICTION ON WRIT OF CERTIORARI

Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * * *

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

* * * *

§1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of

any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, §2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, §1, 78 Stat. 445.

No. 79-505

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNIHEALTH SERVICES CORPORATION, PETITIONER

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is not reported. The opinion of the district court (Pet. App. 4a-21a) is reported at 464 F. Supp. 811. An earlier opinion of the district court (Pet. App. 22a-59a) is reported at 448 F. Supp. 1059.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1979. The petition for a writ of certiorari was filed on September 25, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court had jurisdiction to review a dispute between petitioner and the Department of Health, Education, and Welfare concerning the proper method of determining the "reasonable cost" of services rendered by petitioner to providers of medical services under the Medicare Act.

STATEMENT

1. The Health Insurance for the Aged Act (codified in Title XVIII of the Social Security Act and commonly known as the Medicare Act), 42 U.S.C. 1395 *et seq.*, requires the Secretary of Health, Education, and Welfare to reimburse qualified providers of health care for the "reasonable cost" of the medical services they furnish to eligible Medicare beneficiaries. 42 U.S.C. 1395f(b). Reasonable cost is defined as "the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services * * *." 42 U.S.C. 1395x(v)(1)(A). The statute further provides that reasonable cost "shall be determined in accordance with regulations establishing the method or methods to be used, and the items to be included * * *." *Ibid.* Under the authority conferred by 42 U.S.C. 1395hh, the Secretary has promulgated regulations specifying the method for determining the reasonable cost of medical services furnished by a provider. 42 C.F.R. 405.401-405.488. In addition, the Secretary has published various interpretive "Health Insurance Manuals" in order to provide further detail on the proper application of the Medicare statute and regulations. One of these, Health Insurance Manual-15 (HIM-15), entitled the "Provider Reimbursement Manual," contains guidelines for the implementation of the statutory and regulatory requirement that Medicare providers be reimbursed only for the reasonable cost of providing care to Medicare beneficiaries.

The Manual explains that, in some situations, the propriety of reimbursing a provider for fees it has paid to private companies for services or supplies can be determined only after a detailed analysis of each specific service or supply, its appropriate price if purchased separately, and its relationship to patient care. For example, Section 2404.2F of the Manual describes the obligations of a provider seeking reimbursement for "management services" obtained from a private entity. The section states:

> Where a provider pays a fee for management services, such provider must identify the services furnished in sufficient detail for the health insurance program to determine that these services, for which reimbursement is sought from the program, are necessary and proper * * * for the production of patient care services and that the costs are reasonable.
>
> Under this provision, the financial intermediary that actually dispenses Medicare funds to the provider (*i.e.*, "the health insurance program" (see 42 U.S.C. 1395h)) may request whatever information it deems necessary to enable it to determine whether the provider's management service fees should be reimbursed. In some instances, the intermediary may conclude, even without a detailed description of the specific management services obtained from a private entity, that a particular provider's management service fee is a proper and reasonable cost incurred in the delivery of patient care services. In other instances, more complete information may be required before a reimbursement decision can be made.

The Provider Reimbursement Manual establishes a category of service organizations called "franchisors" whose fees charged to a provider cannot be reimbursed unless the provider describes in detail each service performed for the fee and the intermediary determines on the basis of that information that the service is necessary and proper for the production of patient care services and that the cost of the service is reasonable. See HIM-15, Section 2133. To be classified as a "franchisor" within the meaning of the Manual, a service entity need not qualify as a "franchise" under state law; rather, the critical consideration is whether the nature of the service operation and the relationship between the service company and the provider create reason to believe that a portion of the fees paid by the provider to the service company is attributable not to the reasonable cost of management services actually rendered, but to some factor unrelated to the production of patient care services, such as the provider's right to use the service company's name or logo.

The only significant difference, then, between a financial intermediary's review of franchise fees and its review of management fees paid to a non-franchise service company is that detailed, component-by-component scrutiny is *required* in a franchise arrangement and merely *permissible* at the intermediary's discretion in a non-franchise situation.

2. Petitioner is a private, profit-making corporation formed to provide certain services to Medicare providers in the home health agency category, as defined in 42 U.S.C. 1395x(m), (n), (*o*). Petitioner services 25 provider clients in a 17-state area and the District of Columbia (Pet. App. 24a). Petitioner charges each of its client

agencies a fixed percentage of the agency's gross billings. The percentage is established by contract in advance and allegedly covers "initial startup fees; professional consultation and orientation program; continued management services; manuals; forms; brochures; other teaching tools; as well as guidance and aid in all financial matters; data processing; billing services and preparation of cost and periodic interim payment reports; and assistance in audit procedures conducted by fiscal intermediaries" (Pet. App. 24a-25a). Petitioner has agreed that it will refund to the providers any portion of its fees for which the providers are not reimbursed under the Medicare program (*id.* at 25a).

Before 1977, petitioner was not treated as a franchisor. As a consequence, the fees it charged to its client agencies apparently were not reviewed with the detailed scrutiny required for franchise fees, and the providers obtained full reimbursement.[1] In 1977, the Social Security Administration informed financial intermediaries that petitioner should be treated as a franchisor. Petitioner complains that this policy decision has been applied retroactively and has affected the intermediaries' review of fees charged for services rendered during the years 1974, 1975, and 1976. Petitioner further alleges that, as a result of the increased financial scrutiny required by its franchisor classification, its client agencies have withheld payment of fees due in a total amount of $800,000 (Pet. App. 5a-6a, 8a, 27a).

Petitioner brought this suit in the United States District Court for the Eastern District of Louisiana, challenging the federal respondents' decision to treat it as a franchisor. Petitioner alleged that that decision violated

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[1]In light of the current procedural posture of this case, we assume that the allegations in petitioner's complaint are true.

its rights under the Due Process Clause in a variety of ways summarized by the district court at Pet. App. 8a-9a. Relying on *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), *Dr. John T. MacDonald Foundation, Inc.* v. *Califano*, 571 F. 2d 328 (5th Cir.) (en banc), cert. denied, 439 U.S. 893 (1978), and *American Association of Councils of Medical Staffs* v. *Califano*, 575 F. 2d 1367 (5th Cir. 1978), cert. denied, 439 U.S. 1114 (1979), the district court dismissed the complaint for lack of jurisdiction. The court held (Pet. App. 20a) that the Medicare Act, by virtue of its incorporation of Section 205(h) of the Social Security Act (see 42 U.S.C. 405(h), 1395ii), precludes the district courts from exercising jurisdiction over petitioner's claims under 28 U.S.C. 1331. The court of appeals affirmed (Pet. App. 1a).

ARGUMENT

Petitioner's principal assertion seems to be that the district court erred in holding that it lacked jurisdiction under 28 U.S.C. 1331. See Pet. 29. Petitioner is plainly wrong. This Court held in *Weinberger* v. *Salfi*, 422 U.S. 749, 757 (1975), that Section 1331 does not confer jurisdiction over cases arising under Title II of the Social Security Act, because Section 205(h) of the Act excludes all sources of jurisdiction other than that provided in Title II itself. See 42 U.S.C. 405(g), (h). The Medicare Act incorporates Section 205(h) (see 42 U.S.C. 1395ii), and therefore jurisdiction under Section 1331 is unavailable to petitioner.[2] See also *Mathews* v. *Eldridge*,

[2]The same reasoning applies to petitioner's assertion that jurisdiction lies under 28 U.S.C. 1332 and 1361 (Pet. 14-16, 25-26). As the Court noted in *Salfi* (422 U.S. at 756 n.3), at the time Section 205(h) was enacted, 28 U.S.C. 41 contained all of the Judicial Code's general grants of jurisdiction to the federal district courts. By precluding suits under 28 U.S.C. (1934 ed.) 41, therefore, Congress intended to make the Social Security Act itself the sole source of jurisdiction over actions to recover on claims arising under Title II. (The question whether 28 U.S.C. 1361 can serve as a jurisdictional base for a suit arising under Title II was presented in *Califano* v. *Yamasaki*, No. 77-1511 (June 20, 1979), but the Court decided the case without reaching that issue.)

424 U.S. 319, 326-332 (1976). In a case decided 11 months before this one, the court of appeals held that these principles preclude review in the district court of challenges to the constitutionality of regulations and guidelines implementing the Medicare Act unless that Act itself grants jurisdiction (as it does, for beneficiaries and providers, in 42 U.S.C. 1395ff and 1395*oo*). *American Association of Councils of Medical Staffs* v. *Califano*, 575 F. 2d 1367 (5th Cir. 1978), cert. denied, 439 U.S. 1114 (1979). The Court denied review in that case, and there is no greater reason to grant review here. See also *Drennan* v. *Harris*, 606 F. 2d 846 (9th Cir. 1979).

Petitioner suggests (Pet. 22-23) that if 42 U.S.C. 1395ii deprives it of judicial review, then that statute is unconstitutional. This Court has enforced review preclusion statutes. See, *e.g.*, *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89 (1978); *Briscoe* v. *Bell*, 432 U.S. 404 (1977). But the present case does not require the Court to consider the constitutionality of such provisions as a general matter. The courts below did not hold that all forms of judicial review are precluded.

This suit is a request for judicial relief filed by a corporation that is not directly affected by the fee review procedures in question. Petitioner is not a provider and does not seek to become one. Petitioner asserts only that Medicare reimbursements to its provider clients are affected by the Secretary's instructions to financial intermediaries and that, because of its contractual relations with its clients, it in turn is financially affected.

Petitioner, in other words, contends that it may suffer incidental consequences as a result of determinations concerning the reimbursement due to its provider clients. The providers to whom these determinations directly apply can themselves obtain administrative and judicial review of the correctness and constitutionality of the determinations and the procedures by which they are reached. See 42 U.S.C. 1395*oo*.

Because it seeks to obtain review of an action by which it is incidentally affected, petitioner may have "standing" in the Article III sense. Compare *United States* v. *SCRAP*, 412 U.S. 669 (1973), with *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). But no principle of constitutional law requires Congress to make judicial review available at the behest of *every* person who has Article III standing but is aggrieved only indirectly. It should be enough, in most circumstances, that the controversy is of a sort that can be resolved at the behest of some aggrieved party. That is true here, for the providers themselves may obtain judicial review of the policy decision challenged by petitioner.

Moreover, the district court did not reject the possibility that petitioner could assert its claim for damages in the Court of Claims (see Pet. App. 21a), and petitioner has in fact filed an action in that court raising the identical issues involved here.[3] Until this avenue of

[3]See *Unihealth Services Corporation* v. *United States*, No. 273-79C (filed June 27, 1979).

The Court of Claims has held that 28 U.S.C. 1491 gives it jurisdiction to review claims for damages arising out of the Medicare Act and the implementing regulations. See *Appalachian Regional Hospitals, Inc.* v. *United States*, 576 F. 2d 858 (1978); *Whitecliff, Inc.* v. *United States*, 536 F. 2d 347 (1976), cert. denied, 430 U.S. 969 (1977). On September 26, 1979, the government moved to dismiss petitioner's suit in the Court of Claims for want of jurisdiction, arguing that the court's earlier assertion of jurisdiction in *Whitecliff* was erroneous. This motion is pending.

relief has been fully explored, petitioner may not call on this Court to resolve whatever constitutional questions may lurk in an absolute preclusion of judicial review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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